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Collateral Estoppel and Motor Vehicle Accident Litigation in New York

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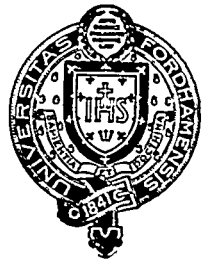

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ERRATA

Page 23, Note 148, Last line. For "subrogee" read "subrogor."
Page 421, Line 1. For "whether" read "weather."
Page 593, Note 6, Line 2. For "witnes" read "witness."

Subsequent Dispositions of Cases Noted

Page 129, *Board of Education v. Allen.* The Supreme Court noted probable jurisdiction at 389 U.S. 1031 (1968).

Page 136, *Madera v. Board of Education.* The Court of Appeals for the Second Circuit reversed at 386 F.2d 778 (2d Cir. 1967), and the Supreme Court denied certiorari, 36 U.S.L.W. 3403 (U.S. April 23, 1968).

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COLLATERAL ESTOPPEL AND MOTOR VEHICLE ACCIDENT LITIGATION IN NEW YORK

*JOSEPHINE Y. KING**

INTRODUCTION

WHY should so much legal talent and energy be dissipated in litigating the interminable procession of motor vehicle negligence cases? The question is not a new one. Despite the fact that trials are actually commenced in only a fraction of the claims,[1] they overflow court calendars. Substitute methods to determine liability and loss are theoretically plausible: a governmental agency patterned on Workmen's Compensation Boards[2] or a panel of jurists aided by medical and other experts. A specialized system for trying a class of disputes is not without precedent, as witness arbitration of labor disputes, commissions to hear civil rights matters and other controversies in areas of public concern. These are outside the conventional procedural mold, yet encompassed by the guarantees of substantive and procedural justice. Due process does not mandate a full-scale jury trial, although some may believe that only this path of glory leads to the "adequate award."

If, pursuing the matter beyond suggestions of administrative alternatives to the present trial system, one suggests that the economic and legal premises of tort liability are woefully inadequate to meet the accident problem in human terms, one can expect the most formidable opposition. Legal scholars have voiced their criticism for many years of a compensation system geared to fault rather than loss, have recognized that many accidents occur without assignable fault, have catalogued the hardship in uncompensated cases, and have deplored the "jackpot justice" of minuscule and mammoth awards.[3]

Some have advocated a system of social insurance and other methods whereby loss is not shifted but distributed over all or a large segment of society. Opponents contend that the expense of a social insurance system

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1. See Franklin, Chanin & Mark, Accidents, Money and the Law, 61 Colum. L. Rev. 1 (1961).

2. 2 F. Harper & F. James, The Law of Torts, § 11.2 (1956); W. Prosser, Handbook of the Law of Torts, § 86 (3d ed. 1964); Green, Automobile Accident Insurance Legislation in the Province of Saskatchewan, 31 J. Comp. Leg. & Int. Law 39 (1949).

3. A. Ehrenzweig, Negligence Without Fault (1951); 2 F. Harper & F. James, supra note 2 at §§ 11.4 & 13.2; Report by the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences (1932); James, The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge, 59 Colum. L. Rev. 408, 408-11 (1959).

is prohibitive, invites fraudulent claims, is impossible to administer and would result in underpayment of claims.[4]

A sweeping transformation of the present system of compensation and of trying accident claims is unlikely to win acceptance in the near future.[5] This does not foreclose a more modest design. If we must live with the system, we ought to make it work better. At the pleading, trial and post-judgment stages, modifications, largely procedural, could result in minimizing delays and repetitious litigation without undue jeopardy to valid claims. The means lie chiefly in the fuller utilization of joinder procedures, special verdicts and other trial techniques and in the expansion of the availability of collateral estoppel.

A nettling, inherent contradiction lurks in pursuing the dual aims of efficiency in adjudication and of protection of the accident victim's right to recover. If, in the future, a judgment will affect more persons upon more matters than the rules of the past have permitted, somewhere a worthy claimant will be caught short. It becomes incumbent, therefore, on the bench, during the transitional period, and upon the bar, at all times, to inform litigants of the possible consequences of the decision in their immediate case. Perhaps a system of court notification to all participants in the event, at the outset of the suit, would be advisable. This notice might be followed by a pretrial conference with prospective plaintiffs and defendants alerting them to the possible effect of the first adjudication upon their respective rights.

The consideration that has always weighed heavily upon the conscience of the court in deciding the binding effect of a judgment is the possibility of infringing upon the right of due process.[6] But perhaps a parallel may be drawn between the expansion of collateral estoppel and personal jurisdiction[7] and quasi in rem jurisdiction[8] within the safeguards imposed by due process of law.

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4. Calabresi, Fault, Accidents and the Wonderful World of Blum and Kalven, 75 Yale L.J. 216 (1965); James, The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge, 59 Colum. L. Rev. 408, 415-22 (1959); Keeton, Conditional Fault in the Law of Torts, 72 Harv. L. Rev. 401, 441 (1959); Marx, Compensation Insurance for Automobile Accident Victims: The Case for Compulsory Automobile Insurance, 15 Ohio St. L.J. 134 (1954); McVay, Reply to "The Case for Compulsory Automobile Compensation Insurance," 15 Ohio St. L.J. 161 (1954).

5. Keeton, supra note 4, at 439.

6. See Hansberry v. Lee, 311 U.S. 32 (1940); Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912); Elder v. New York & Pa. Motor Express, Inc., 284 N.Y. 350, 31 N.E.2d 188 (1940); Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937); Ordway v. White, 14 App. Div. 2d 498, 217 N.Y.S.2d 334 (4th Dep't 1961).

7. Homburger, The Reach of New York's Long-Arm Statute: Today and Tomorrow, 15 Buffalo L. Rev. 61 (1965); Homburger & Laufer, Expanding Jurisdiction over Foreign

The long-arm statutes of today are strangers to the concepts of Justice Field in *Pennoyer v. Neff*,[9] and yet it cannot be said that judicial regard for due process has been brushed aside. The explanation is rather in the fact that the concept has undergone change (very dramatically in criminal procedure) and that the requirements of due process are fulfilled, although jurisdictional bases have been greatly expanded. So too, to utilize collateral estoppel in situations where heretofore privity or mutuality have barred the way is not to advocate that preclusion should not operate within the limits of due process. Jurisdictional concepts have changed in response to the need for more effective protection of at least certain classes—residents of the forum and those injured in the forum.[10] Whose rights are to be protected; and how and to what extent are determinations of policy to be made in an ever evolving context? To encourage greater flexibility in the application of collateral estoppel assumes that the courts cannot, and will not, countenance anything less than a full and fair opportunity to be heard.[11] Yet the time, place and conditions for exercising that right may, in the broader community interest, no longer be a choice dictated solely by the individual.

Initially, this article examines the tenor and terms of the statute governing responsibility for the operation of motor vehicles in New York. Does legislative policy justify or counsel a particularistic approach to the trial of accident claims? Does a main stream of common issues course through such a high proportion of these cases that the conclusiveness of a judgment may fairly bind more issues and more litigants here than in other categories of disputes?

The discourse proceeds from the statutory and early case law to an examination of the doctrine of collateral estoppel and its application in vehicle accident litigation. *Cummings v. Dresher*,[12] a microcosm of the complexities of preclusion is closely scrutinized. The article closes with suggestions for procedural innovations.

Torts: The 1966 Amendment of New York's Long-Arm Statute, 16 Buffalo L. Rev. 67 (1966).

8. See Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966); Jones v. McNeill, 51 Misc. 2d 527, 273 N.Y.S.2d 517 (Sup. Ct. 1966); Comment, 16 Buffalo L. Rev. 769 (1967).

9. 95 U.S. 714 (1877).

10. See Homburger & Laufer, supra note 7.

11. See Hansberry v. Lee, 311 U.S. 32 (1940); Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918); Southern Pacific R.R. v. United States, 168 U.S. 1, 48-49 (1897); Graves v. Associated Transp., Inc., 344 F.2d 894, 900 (4th Cir. 1965); 1-B J. Moore, Federal Practice, ¶ 0.406 [2] (2d ed. 1965).

12. 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

I. The Policy of Owner Responsibility as Expressed in the Present Statute

It is clear from the present provisions of Article VI of the Vehicle and Traffic Law that the legislature intended innocent victims of negligently caused accidents to have a financially responsible owner or operator to respond in damages for personal injuries or property damages.[13] The law mandates that application for registration of a motor vehicle be accompanied by proof of financial security,[14] and that such proof be continuously maintained during the registration period.[15] The license and car registration of the owner-driver,[16] and the license of a driver other than an owner[17] shall be revoked where a motor vehicle has been operated absent proof of financial security.[18] Similarly, the privilege of a resident or non-resident to operate a vehicle of foreign registry on the highways of New York shall be revoked where the owner,[19] or a driver not the owner,[20] does not meet the standards of financial security.[21] The minimum standards of insurance coverage, whether owner's[22] or operator's[23] policy of liability insurance, are specified by the law.

Where, upon proof that financial security is no longer in effect, the registration, driver's license or driving privilege has been revoked following a motor vehicle accident in New York, such privileges will not be restored for a period of one year,[24] and the Commissioner may require

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13. The "Declaration of purpose" in the N.Y. Veh. & Traf. Law § 310(2) reads: "The legislature is concerned over the rising toll of motor vehicle accidents and the suffering and loss thereby inflicted. The legislature determines that it is a matter of grave concern that motorists shall be financially able to respond in damages for their negligent acts, so that innocent victims of motor vehicle accidents may be recompensed for the injury and financial loss inflicted upon them. The legislature finds and declares that the public interest can best be served in satisfying the insurance requirements of this article by private enterprise operating in a competitive market to provide proof of financial security through the methods prescribed herein." Id.

14. N.Y. Veh. & Traf. Law § 312(1). The proof of financial security "shall be evidenced by a certificate of insurance or . . . a financial security bond, a financial security deposit or qualification as a self-insurer . . . ." Id.

15. N.Y. Veh. & Traf. Law § 318(1)(a).

16. N.Y. Veh. & Traf. Law § 318(2)(a).

17. N.Y. Veh. & Traf. Law § 318(3)(a).

18. In the case of the non-owner driver, knowledge that proof of financial security was not in effect is specified. N.Y. Veh. & Traf. Law §§ 318(3)(a)-(5)(a), as amended, (Supp. 1967).

19. N.Y. Veh. & Traf. Law § 318(4)(a).

20. N.Y. Veh. & Traf. Law § 318(5)(a).

21. N.Y. Veh. & Traf. Law § 341.

22. N.Y. Veh. & Traf. Law § 311(4)(a).

23. N.Y. Veh. & Traf. Law § 318(8).

24. N.Y. Veh. & Traf. Law §§ 318(9)(a)-(b).

evidence that (1) no cause of action has been commenced against the owner or operator within one year of the accident or that a release has been obtained by the owner or operator, or (2) no judgment arising out of such claim remains unsatisfied.[25] Emphasis is added by the requirement that where an owner or operator involved in an accident causing death or bodily injury fails to submit proof of financial security within 48 hours of the accident, the vehicle is subject to impoundment[26] and release may take place only after final disposition of the claim "by payment of a judgment or settlement by the owner, or by a final judgment in his favor . . . ."[27] A violation of the financial security provisions of Article VI constitutes a misdemeanor.[28]

Under Article VII of the New York Vehicle and Traffic Law,[29] operators' licenses and registrations shall be suspended for delinquency in satisfying judgments.[30] In the case of bodily injury or death, any judgment for damages is a predicate of the suspension power; in the case of property damages, failure to satisfy a judgment in excess of one hundred fifty dollars may result in suspension.[31]

Following the occurrence of an accident resulting in bodily injury or death or property damage exceeding one hundred fifty dollars, the owner or operator must furnish security within ten to sixty days to avoid suspension, unless he had in effect at the time of the accident an automobile liability policy.[32]

Section 388[33] is the crucial provision, fixing tort liability on the owner of a vehicle negligently operated in the state of New York. It states:

1. Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner . . . .

. . . .

3. As used in this section, "owner" shall be as defined in section one hundred

25. N.Y. Veh. & Traf. Law §§ 318(9)(c)(1)-(2). See also N.Y. Veh. & Traf. Law §§ 318(11)(a)-(b).

26. N.Y. Veh. & Traf. Law § 318(12)(a).

27. N.Y. Veh. & Traf. Law § 318(12)(c).

28. N.Y. Veh. & Traf. Law § 319.

29. Motor Vehicle Safety Responsibility Act.

30. N.Y. Veh. & Traf. Law § 332(a) (Supp. 1967). A bond or insurance policy must be in force at the time of the accident. See also N.Y. Veh. & Traf. Law §§ 332(d), 341-43.

31. N.Y. Veh. & Traf. Law § 332(b). For applicability of suspension sanctions and security requirements to non-residents see N.Y. Veh. & Traf. Law §§ 338, 344.

32. N.Y. Veh. & Traf. Law § 335(a).

33. N.Y. Veh. & Traf. Law § 388. The basic provisions of this section are traceable to 1924, when the N.Y. H'way Law of 1909 was amended to add § 282-e. N.Y. Sess. Laws 1924, ch. 534. § 388 is derived from § 59 of the Veh. & Traf. Law as amended by N.Y. Sess. Laws 1958, ch. 577.

twenty-eight of this chapter and their liability under this section shall be joint and several.

This substantive provision is further implemented by a procedural method to effect service of process upon a non-resident operator or non-resident owner of a vehicle operated with his permission in New York:

§ 253. Services of summons on non-residents.

1. The use or operation by a non-resident of a vehicle in this state, or the use or operation in this state of a vehicle in the business of a non-resident, or the use or operation in this state of a vehicle owned by a non-resident if so used or operated with his permission, express or implied, shall be deemed equivalent to an appointment by such non-resident of the secretary of state to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident or collision in which such non-resident may be involved while using or operating such vehicle in this state or in which such vehicle may be involved while being used or operated in this state in the business of such non-resident or with the permission, express or implied, of such non-resident owner; and such use or operation shall be deemed a signification of his agreement that any such summons against him which is so served shall be of the same legal force and validity as if served on him personally within the state and within the territorial jurisdiction of the court from which the summons issues, and that such appointment of the secretary of state shall be irrevocable and binding upon his executor or administrator.

This section and its predecessors[34] represent an exception to the territorial concept of jurisdiction expounded in *Pennoyer v. Neff*[35] and are forerunners of the long-arm statutes,[36] in which state policy and due process have achieved new accommodation.

Both section 388 and section 253 evidence the concern of the New York legislature to reach the owner and driver of a vehicle the negligent operation of which has proximately caused injuries to the person or property of another. In the following passages the development, re-affirmation and steadfastness of the legislative policy is illustrated by reference to statutory provisions and case law.

Prior Legislation and the Issue of Permission in Single-stage Litigation

The counterpart of section 388 was introduced into the laws of New York by way of an amendment in 1924 to the old Highway Law of 1909.[37] Prior to the enactment of section 282-e, common law prevailed in New York; the owner was not liable for the negligence of a driver unless the car was operated on the owner's business or the owner was present and

34. The provision dates back to N.Y. H'way Law of 1909, § 285-a as amended by N.Y. Sess. Laws 1928, ch. 465. Its direct antecedent is § 52, N.Y. Sess. Laws 1958, ch. 568.

35. 95 U.S. 714 (1877).

36. Scott, Jurisdiction Over Nonresident Motorists, 39 Harv. L. Rev. 563 (1926). See Olberding v. Illinois Cent. R.R., 346 U.S. 338 (1953); Wuchter v. Pizzuti, 276 U.S. 13 (1928); Hess v. Pawloski, 274 U.S. 352 (1927).

37. N.Y. H'way Law of 1909, § 282-e, as amended, N.Y. Sess. Laws 1924, ch. 534.

the driver was his agent, subject to his control.[38] While proof that the defendant owned the car raised a presumption that it was being operated for his benefit,[39] such presumption could be overcome by substantial evidence that no agency relationship existed between the owner and the allegedly negligent driver. The presence of the owner at the time of the accident was in itself insufficient to impose liability where the driver was employed and controlled by another.[40] Therefore the presence and/or permission of the owner had to be supplemented by control or benefit under a theory of principal-agent accountability.[41]

Before the enactment of section 282-e, the recurring attempts to hold the owner for the negligence of a member of his family driving his car were met by the agency argument.[42] If a son, in pursuit of his own pleasure or benefit, borrowed his father's car and negligently caused injury to another, the latter could not hold the father accountable since the driver was not the agent of the owner. While noting that other jurisdictions applied a "special rule" of agency in family use cases, the New York Court of Appeals in 1917 concluded that such an approach was "novel," "weak" and "far-fetched."[43]

But in this common law agency period, the issue of permission was emerging as the critical factor. Liability did not attach to the owner, even though the car was operated in the business of the owner, where the injured party was a passenger invited or permitted to ride by the driver against explicit instructions to the contrary by the owner. In such cases, the court held that the driver, servant or agent, was acting outside the scope of his employment.[44] In a case which, analytically, straddles the common law and statutory periods, Chief Judge Cardozo found the owner liable under both theories, where the driver of the owner's truck permitted another employee to operate it without the owner's authorization.[45] The basis of common law liability was the negligence of the servant (driver) who continued on the truck and had the power and authority

38. Potts v. Pardee, 220 N.Y. 431, 116 N.E. 78 (1917); Van Blaricom v. Dodgson, 220 N.Y. 111, 115 N.E. 443 (1917).

39. Ferris v. Sterling, 214 N.Y. 249, 253, 108 N.E. 406, 407 (1915).

40. Potts v. Pardee, 220 N.Y. 431, 116 N.E. 78 (1917).

41. Id.

42. See Ferris v. Sterling, 214 N.Y. 249, 108 N.E. 406 (1915); Tanzer v. Read, 160 App. Div. 584, 145 N.Y.S. 708 (1st Dep't 1914); Cunningham v. Castle, 127 App. Div. 580, 111 N.Y.S. 1057 (1st Dep't 1908); Maher v. Benedict, 123 App. Div. 579, 108 N.Y.S. 228 (2d Dep't 1908).

43. Van Blaricom v. Dodgson, 220 N.Y. 111, 115-16, 115 N.E. 443, 444 (1917).

44. Goldberg v. Borden's Condensed Milk Co., 227 N.Y. 465, 125 N.E. 807 (1920); Rolfe v. Hewitt, 227 N.Y. 486, 125 N.E. 804 (1920).

45. Grant v. Knepper, 245 N.Y. 158, 156 N.E. 650 (1927).

to control its operation by the substitute.[46] The statutory liability of the owner was predicated on the authorized use of the truck even though the method of operation (by the substitute) was unauthorized.[47]

Section 282-e of the Highway Law read as follows:

> Every owner of a motor vehicle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner.[48]

With the enactment of this provision, the consenting owner no longer enjoyed protection from liability if the car was employed solely for a permitted private purpose of the borrower-driver.[49] The statute expressed two conditions precedent to liability, permission and legal use or operation. The differentiation between these two conditions does not seem to appear clearly stated until *Arcara v. Moresse*[50] since the earlier cases concentrated upon the nature of the permission granted.

Thus, the owner was not held liable to injured passengers where he could prove that his driver invited or permitted riders against the explicit instructions of the owner,[51] or to other travelers on the highway where the driver departed from the permitted area of use[52] or where the permitee entrusted the car to another without the owner's authorization[53] or where the owner had no knowledge that the car was borrowed, knowledge being a prerequisite for consent or permission.[54] In some instances where the driver violated instructions of the owner, the court concluded that the car was illegally used or operated and refused to impose liability on the owner.[55] It was also determined by the earlier cases, that section 282-e was sufficiently broad to encompass owner liability

46. Id. at 163-64, 156 N.E. at 650-51.

47. Id.

48. N.Y. Sess. Laws 1924, ch. 534. See note 33 supra. The wording of the permission was modified slightly when it became § 59 of the Veh. & Traf. Law of 1929 and again by subsequent amendments.

49. See Psota v. Long Island R.R., 246 N.Y. 388, 393, 159 N.E. 180, 181 (1927).

50. 258 N.Y. 211, 179 N.E. 389 (1932). See also Grant v. Knepper, 245 N.Y. 158, 156 N.E. 650 (1927).

51. Compare Psota v. Long Island R.R., 246 N.Y. 388, 159 N.E. 180 (1927), with Cohen v. Neustadter, 247 N.Y. 207, 160 N.E. 12 (1928).

52. Chaika v. Vandenberg, 252 N.Y. 101, 169 N.E. 103 (1929).

53. Owen v. Gruntz, 216 App. Div. 19, 214 N.Y.S. 543 (4th Dep't 1926).

54. Atwater v. Lober, 133 Misc. 652, 233 N.Y.S. 309 (Cayuga County Ct. 1929). See also Owen v. Gruntz 216 App. Div. 19, 214 N.Y.S. 543 (4th Dep't 1926).

55. Chaika v. Vandenberg, 252 N.Y. 101, 169 N.E. 103 (1929); Fluegel v. Coudert, 244 N.Y. 393, 155 N.E. 683 (1927).

both to passengers injured in his car as well as to travelers on the highway.[56]

The first condition, express or implied permission, has continued in the same form through various changes in the law. The clause "negligence in the operation" has since 1958 read "negligence in the use or operation,"[57] and the word "legally," modifying "using and operating," was deleted in the same year.[58] While use as opposed to operation, and legal or lawful use as opposed to unlawful use raised some difficulties in construction, the early decisions were preoccupied with permission.

In *Arcara v. Moresse*,[59] the factual situation resembled *Grant v. Knepper*,[60] and a recent case of considerable importance in New York law, *Hinchey v. Sellers*.[61] *Grant* involved a permittee who was a servant driving on his master's business. *Arcara* and *Hinchey* involved the loan of a car to a friend for the latter's personal benefit. The reasons which spared the owner from liability in *Hinchey* are discussed subsequently.[62] But in *Grant* and in *Arcara*, liability attached since the unauthorized substitute driver was not banned from the car, and the original permittee or legal user remained in the car as "master of the ship" after having turned the wheel over to another.[63]

The court drew a distinction between the owner's instructions to his gratuitous bailee not to allow another to drive, and a restriction not to accept another as guest in the car.[64] The former, said the court, related

56. Cohen v. Neustadter, 247 N.Y. 207, 160 N.E. 12 (1928); Psota v. Long Island R.R., 246 N.Y. 388, 159 N.E. 180 (1927). N.Y. Veh. & Traf. Law § 282-e and its successors did not abrogate the common law rule that where the driver was not the agent of the owner, the driver's negligence did not bar the owner's claim for property damage. See Mills v. Gabriel, 259 App. Div. 60, 18 N.Y.S.2d 78 (2d Dep't), aff'd, 284 N.Y. 755, 31 N.E.2d 512 (1940); Gochee v. Wagner, 232 App. Div. 401, 250 N.Y.S. 102 (4th Dep't 1931), rev'd on other grounds, 257 N. Y. 344, 178 N.E.2d 553 (1932). (The owner may recover from a third person for damages to his car where he was not present, the car was used for the permittee's own purposes, and the permittee and other driver were both negligent. The negligence of the permittee is not imputed to the owner-plaintiff).

57. N.Y. Sess. Law 1958, ch. 577, § 1.

58. Id.

59. 258 N.Y. 211, 179 N.E. 389 (1932).

60. 245 N.Y. 158, 156 N.E. 650 (1927). See text accompanying notes 45-47 supra.

61. 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959).

62. See text accompanying note 208 infra.

63. The court accepted the plaintiffs' version in Arcara, that the original borrower sat beside his substitute driver when the negligence of the latter resulted in the collision. Brief for Appellant at 22, Arcara v. Moresse, 258 N.Y. 211, 179 N.E. 389 (1932).

64. How valid is this distinction?

(1) A, in loaning his car to B, tells him: "You must not permit anyone else to drive it." B ignores the instruction; C drives A's car negligently; A is liable.

(2) A, in loaning his car to B, tells him: "You must not permit C to go with you in the

to the manner of operation and its violation did not make the "use" illegal or without permission.[65] Therefore, when the defendant owner in *Arcara* consented to his nephew's borrowing the car for a personal errand and while returning from the errand an invitee of the nephew negligently drove the car,[66] the nephew was "legally using" the car and his violation did not relieve the owner of liability. Legal use and permission persisted despite disobedience to limiting instructions as to who might drive.[67]

The decision may be interpreted as an expression of policy favoring owner liability. Where there was some doubt that the permission included the bailee's substitute, the foundation of owner liability was shored up by holding that the bailee continued as legal user of the car. It is difficult to see how the qualification "legally" (using and operating) accomplished much more than the requirement of permission, although some cases struggled to make a distinction. On the other hand, the dual terms "use" and "operation" may represent distinct acts and the inclusion of both meets the situation of the borrower who entrusts the driving to another.

The vast number of cases to determine owner liability under the successors of the old statute, section 59,[68] and the present section 388[69] have centered on the scope of permission.[70] If the driver's negligence is reasonably clear, proof will be concentrated on the circumstances and conditions attending the loan of the car.[71] Thus in these single-stage cases, unencumbered by questions of the judgment's effect upon subsequent claims and claimants, it is apparent that the major issues are few and repetitive—negligence (and contributory negligence) and permission. The relatively uncomplicated and familar structure of the single lawsuit under section 388 lends itself to the operation of estoppel when the litigation reaches the multiple stage.

The premises which emerge from the half-century of statutory and case law development in the motor vehicle field appear to be: that policy is conspicuously plaintiff-oriented; that owner liability depends on imputed negligence and permission; and that these decisive issues recur so con-

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car." B ignores the instruction; C not only accompanies B but also drives A's car; A is not liable.

65. Arcara v. Moresse, 258 N.Y. 211, 214, 179 N.E. 389, 390 (1932).

66. Record at 23, 32, 40.

67. There are some contradictions in the testimony of the nephew as to whether or not his uncle told him on this particular occasion not to permit anyone else to drive the car.

68. N.Y. Veh. & Traf. Law § 59 (now N.Y. Veh. & Traf. Law § 388).

69. N.Y. Veh. & Traf. Law § 388.

70. See, e.g., Burmaster v. State, 7 App. Div. 2d 775 (3d Dep't 1958), aff'd, 7 N.Y.2d 65, 163 N.E.2d 742, 195 N.Y.S.2d 385 (1959); Lozada v. Copeland, 207 Misc. 382, 138 N.Y.S.2d 521 (Sup. Ct. 1955).

71. See text accompanying notes 208-15 infra.

sistently that attorneys must recognize the importance of contesting them vigorously and competently. Once these issues have been fully litigated should their determination be binding only upon the original adversaries?

II. Application of Collateral Estoppel

For the purpose of this paper, it is not essential to review the interesting origins of res judicata[72] (merger and bar)[73] and of collateral estoppel.[74] The tenets underlying both doctrines[75] and the demarcation between them spring from the elusive concept of a single cause of action.[76] Preliminarily, it is sufficient to point out that the application of collateral estoppel will preclude the redetermination of certain issues of fact or law[77] between certain categories of parties. The crucial questions are, therefore, which issues and which litigants?[78] Are the classic rules restricting the availability of estoppel essential guardians of due process, or impediments to insuring finality of judgments and avoidance of repetitious litigation? The recent decisions of New York's highest court[79] discard or remold some of these rules and presage a cautiously expanded role for preclusion. Perhaps it is more accurate to say that the rules are being viewed from a fresh perspective, dominated by the ever-lengthening shadow of negligence cases.

Parties and Privies

The traditional requirements relating to parties invoking or resisting the plea of collateral estoppel devolve into three separate concepts:

72. Buckland, Text-Book of Roman Law 695-98 (3d ed. 1963); Millar, The Premises of the Judgment As Res Judicata in Continental and Anglo-American Law, 39 Mich. L. Rev. 238 (1940); Scott, Introduction to Symposium on Res Judicata, 39 Iowa L. Rev. 214 (1954).

73. Restatement of Judgments §§ 47, 48 (1942).

74. Millar, The Historical Relation of Estoppel by Record to Res Judicata, 35 Ill. L. Rev. 41 (1940).

75. Cleary, Res Judicata Reexamined, 57 Yale L.J. 339, 342-49 (1948); Polasky, Collateral Estoppel—Effects of Prior Litigation, 39 Iowa L. Rev. 217 (1954); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1 (1942).

76. Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209 (1953); De Coss v. Turner & Blanchard, Inc., 267 N.Y. 207, 196 N.E. 28 (1935); Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929); C. Clark, Code Pleadings, 137 (2d ed. 1947); McCaskill, Actions and Causes of Action, 34 Yale L.J. 614, 638 (1925).

77. Commissioner v. Sunnen, 333 U.S. 591 (1948); Zimmerman v. Matthews Trucking Corp., 203 F.2d 864, modified, 205 F.2d 837 (8th Cir. 1953); Restatement of Judgments §§ 68, 70 (1942).

78. See generally Notes 52 Colum. L. Rev. 647 (1952); 52 Cornell L.Q. 724 (1967); 65 Harv. L. Rev. 820 (1962); 36 N.Y.U.L. Rev. 1158 (1961).

79. B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); Cummings v. Dresher, 18 N.Y.2d 195, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

privity, adversarial status and mutuality. Commencing with the proposition that a prior judgment binds only parties and their privies,[80] the law has defined privity as "mutual or successive relationships to the same rights of property."[81] Generally, the successor is bound in a suit commenced *before* the grant, sale, assignment or mortgage of the property to which he has succeeded.[82] There is an identification of the successor and the predecessor respecting the same legal right.[83] The notion of privity encompasses also those actually controlling a lawsuit while not appearing as parties of record.[84] Finally, those whose interests are represented in prior litigation brought on their behalf by a fiduciary are concluded by the judgment,[85] as are members of a class in class actions,[86] and persons with future interests.[87]

Within the confines of this rule, that only parties and their privies are bound, there is little prospect of liberalizing the use of collateral estoppel in accident cases via modification of the established privity concept. An

80. Restatement of Judgments §§ 79, 83 (1942); 1 A. Freeman, Judgments, § 438 (5th ed. 1925); The party must appear in the same capacity in both lawsuits, Restatement of Judgments § 80 (1942); 1 Freeman §§ 418, 419. The court of appeals stated in St. John v. Fowler, 229 N.Y. 270, 128 N.E. 199 (1920): "The rule is that a judgment in another action cannot be admitted save for or against parties or privies to it; it being received on the principle of estoppel, to which it is essential that it should be mutual." Id. at 274, 128 N.E. at 200. See also Peare v. Griggs, 8 N.Y.2d 44, 167 N.E.2d 734, 201 N.Y.S.2d 326 (1960); First Nat'l Bank v. Shuler, 153 N.Y. 163, 47 N.E. 262 (1897).

81. Haverhill v. International Ry., 217 App. Div. 521, 522, 217 N.Y.S. 522, 523 (4th Dep't 1926), aff'd mem., 244 N.Y. 582, 155 N.E. 905 (1927); 1 Freeman, supra note 80, at § 439; S. Greenleaf, Evidence § 189 (16th ed. 1899).

82. 1 Freeman supra note 80, at § 440.

83. The privity requirement was interpreted in Commissioners of the State Ins. Fund v. Low, 3 N.Y.2d 590, 148 N.E.2d 136, 170 N.Y.S.2d 795 (1958) to deny a defensive plea of collateral estoppel. In the first action, Low sued the State of New York in the court of claims for personal injuries resulting from a collision with a state police car. The court found the state's servant negligent and Low free from contributory negligence. In the second action, the Fund sued as statutory assignee of the cause of action of the widow of a passenger-trooper in the state car. Low asserted that the Fund as a state agency was in privity with the state as defendant in the court of claims action and that the prior judgment clearing Low of negligence was assertable against the Fund. The court held, however, that provisions of the Workmen's Comp. Law manifested the legislative intent to treat the Fund as a private carrier and as such the Fund was not privy to the state and therefore not bound by the former judgment. Cf. MVAIC v. National Grange Mut. Ins. Co., 19 N.Y.2d 115, 224 N.E.2d 869, 278 N.Y.S.2d 367 (1967); Flynn v. State, 53 Misc. 2d 929, 280 N.Y.S.2d 512 (Ct. Cl. 1967).

84. Restatement of Judgments § 84 (1942); 1 Freeman, supra note 80, at § 431. A prior judgment may be used against a secret party in control of the prior action. See Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82 (3d Cir. 1941).

85. Restatement of Judgments § 85 (1942); 1 Freeman, supra note 80, at § 430.

86. Restatement of Judgments § 86 (1942); 1 Freeman, supra note 80, at § 436.

87. Restatement of Judgments § 87 (1942).

inroad may be possible, however, by structuring the class of "party" to include those who are "vouched in." The suggestion, subsequently developed, is that in negligence suits against drivers, the owners of the vehicles involved should be given formal notification and a full opportunity to defend with the result that they will be bound by the final judgment.[88]

Co-Parties

What happens to the general rule that only parties and their privies are bound, when the prior judgment is not between a single plaintiff and a single defendant but involves co-plaintiffs or co-defendants? The position of the Restatement[89] is that a judgment does not conclude parties[90] as to issues not litigated between themselves. The rationale of the rule is that one who is to be bound by a decision must have had his day in court to confront his opponent *qua* opponent. It is perhaps conceivable that the issue between one defendant and his former co-defendant may be different.[91] But this is not the usual case determining liability in motor vehicle accidents; the issues are normally identical—negligence and contributory negligence. Collateral estoppel cannot enter the picture if the issues are not identical. As Justice Halpern stated in *Ordway v. White*:[92] "If it is demonstrated that, because of peculiar circumstances in a particular case, the defendant did not have a full and fair opportunity to present his version of the accident upon the trial . . . it may well be held that the adjudication in that action should not bar relitigation of the issue in his subsequent action upon his own claim."[93] Granted this flexibility and discretion, *Glaser v. Huette*[94] should no longer inhibit the availability of collateral estoppel in a subsequent suit involving identical negligence issues between former co-defendants.[95]

88. See Recommendations pp. 42-47 infra.

89. Restatement of Judgments § 82 (1942); 1 Freeman, supra note 80, at § 423.

90. The formal alignment of the parties is not decisive. The important fact is whether the issues were raised and determined between them. 1 Freeman, supra note 80, at § 423.

91. See Self v. International Ry., 224 App. Div. 238, 230 N.Y.S. 34 (4th Dep't 1928); Trotter v. Klein, 140 Misc. 78, 249 N.Y.S. 20 (Sup. Ct. 1930).

92. 14 App. Div. 2d 498, 217 N.Y.S.2d 334 (4th Dep't 1961).

93. Id. at 502, 217 N.Y.S. 2d at 340. See Panakos v. Corbecki, 44 Misc. 2d 208 (Nassau County Dist. Ct. 1964).

94. Glaser v. Huette, 232 App. Div. 119, 249 N.Y.S. 374 (1st Dep't 1931), aff'd mem., 256 N.Y. 686, 177 N.E. 193 (1931).

95. For cases preceding Glaser which did not adhere to the adversarial requirements, see, e.g., Eissing Chem. Co. v. People's Nat'l Bank, 205 App. Div. 89, 199 N.Y.S. 342 aff'd mem., 237 N.Y. 532, 143 N.E. 731 (1923); Duignan v. Pawlikowski, 134 Misc. 22, 235 N.Y.S. 125 (Sup. Ct. 1929) (plaintiff in the second action could not prove freedom from contributory negligence since his negligence had been determined by the prior judgment for the plaintiff against the co-defendants).

In *Glaser*, the first action was brought in municipal court by injured passengers against the driver of one car (Glaser) and the owner and driver of the second car (Huette and Austin). Both drivers were found negligent and judgment was entered against all of the defendants. The second suit brought by former defendant Glaser charged that Austin's negligent driving resulted in personal injuries and property damages to him. Defendant Huette asserted "res judicata" as a defense. The court held that the passengers' action determined only defendants' negligence toward the passengers and did not settle the liability of the co-defendants *inter se*.[96]

Between this appellate division decision, affirmed without opinion in 1931, and *Minkoff v. Brenner*[97] in 1962, lower court cases[98] found the identity of issues test of *Israel v. Wood Dolson Co.*[99] more persuasive than the *Glaser* adversarial requirement.[100] But decisions in the first[101] and second[102] departments adhered to the rule. *Ordway v. White*,[103] a fourth department case in 1961 found *Glaser* no longer "controlling."

The confusion was not dispelled with *Minkoff* either by the appellate division's memorandum[104] or the court of appeals' affirmance without opinion.[105] The factual situation involved three vehicles. The collision between plaintiff's and defendant's cars propelled the plaintiff's car against a parked vehicle. The owner of the parked vehicle sued both drivers and the owner of one car in municipal court (Borough of Queens) and recovered against all of them. The former defendant driver then sued the driver and owner of the second car in the City Court of New York City. The latter moved to amend their answer to plead the municipal court judgment as "res judicata" on the issues of negligence and contributory negligence. The motion was denied and the denial affirmed by successive appellate decisions[106] culminating in the affirmance by the court of appeals.[107]

96. 232 App. Div. 119, 249 N.Y.S. 374, 375 (1st Dep't 1931).

97. 10 N.Y.2d 1030, 180 N.E.2d 434, 225 N.Y.S.2d 47 (1962).

98. See 5 J. Weinstein, H. Korn & A. Miller, New York Civil Practice ¶ 5011.37, n.231 (1966); James v. Saul, 17 Misc. 2d 371, 184 N.Y.S.2d 934 (N.Y.C. Mun. Ct. 1958).

99. Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

100. See Moran v. Lehman, 7 Misc. 2d 994, 996-97, 157 N.Y.S.2d 684, 686-87 (N.Y.C. Mun. Ct. 1956).

101. Friedman v. Salvati, 11 App. Div. 2d 104, 201 N.Y.S.2d 709 (1st Dep't 1960).

102. Grande v. Torello, 12 App. Div. 2d 937, 210 N.Y.S.2d 562 (2d Dep't 1961).

103. 14 App. Div. 2d 498, 217 N.Y.S.2d 334 (4th Dep't 1961).

104. 13 App. Div. 2d 838 (2d Dep't 1961).

105. 10 N.Y.2d 1030, 180 N.E.2d 434, 225 N.Y.S.2d 47 (1962).

106. 13 App. Div. 2d 838 (2d Dep't 1961).

107. 10 N.Y.2d 1030, 180 N.E.2d 434, 225 N.Y.S.2d 47 (1962). For a subsequent lower court opinion preferring Justice Halpern's rationale, see Sunshine v. Green Bus Lines, Inc., 41 Misc. 2d 1037, 247 N.Y.S.2d 369 (Sup. Ct. 1963). But see Terwilliger v. Terwilliger, 52 Misc. 2d 404, 276 N.Y.S.2d 8 (Sup. Ct. 1966).

What is currently needed in this narrow but troublesome sector of collateral estoppel is a fully expounded *ratio decidendi* by the highest court of New York laying *Glaser* to rest or offering convincing reasons to sustain its viability. The prospect of contribution[108] would seem to be a sufficient motivation for each defendant to hold in his co-party by thrusting as much of the fault upon him as possible. No defendant's attorney should be ignorant of this post-judgment opportunity to share the damages and if his client cannot attain the whole loaf of exoneration, the half loaf of contribution is better than none.

It is assumed above that the liability picture does not permit a separation of the co-defendants into an active and a passive wrongdoer.[109] If such a distinction could be alleged,[110] the secondary tortfeasor would have the right to interpose a cross-claim in the nature of impleader.[111] Since the cause of action in this type of cross-claim would bear a close relationship to the plaintiff's claim and its outcome, a judgment would conclude all parties of the main action and the cross-claim and operate as collateral estoppel on the issues necessarily determined.

The availability of the impleader type of cross-claim under circumstances which make few demands on the cross-claimant, that is, where the plaintiff in the main action has obligingly joined both defendants and solved any difficulties of notice and basis jurisdiction and where a substantial portion of the evidence would be the same as in the main action, should prompt its more extensive use by defense counsel.

If the courts do not take the initiative by overruling *Glaser,* then it is recommended that serious consideration be given by the legislature to a compulsory cross-claim in vehicle accident cases. The New York statutes *permitting* cross-claims[112] and counterclaims[113] arising from *any* cause of action the defendant possesses, clearly express a purpose of economy of litigation. Where, as in an indemnity situation, the cross-claim rests wholly or partially on the same factual foundation as the main action, one adjudication binding upon all claims is manifestly preferable in terms of consistency, time and expense. If a defendant alleging a claim against his co-party fails to utilize the impleader type cross-claim, he should risk the

108. N.Y. C.P.L.R. §§ 1401, 1402.

109. See Berg v. Town of Huntington, 7 N.Y.2d 871, 196 N.Y.S.2d 1001 (1959); Egan v. Syracuse Savings Bank, 28 Misc. 2d 256, 209 N.Y.S.2d 612 (Sup. Ct. 1961); Cole v. Long Island Lighting Co., 24 Misc. 2d 221, 196 N.Y.S.2d 187 (Sup. Ct. 1959).

110. Mandello v. Brooklyn Doctors Hospital, 8 App. Div. 2d 845, 190 N.Y.S.2d 436 (2d Dep't 1959); Valvo v. Hope's Windows, Inc., 230 N.Y.S.2d 956 (Sup. Ct. 1962). These cases indicate that if there is a possibility of a right of indemnification, the motion to bring a cross complaint will be granted.

111. N.Y. C.P.L.R. § 3019(b).

112. Id.

113. N.Y. C.P.L.R. § 3019(a).

same consequences as one who fails to interpose a compulsory counterclaim in federal court.[114]

If a compulsory cross claim is a desirable procedural innovation in accident cases, on the theory that co-defendants are genuine adversaries, there is even more justification for introducing a compulsory counterclaim in New York in this particular category of litigation. The substantial liberalization in 1936 of the counterclaim rule in New York[115] resulting in a provision similar to CPLR section 3019(a) stopped short of any compulsion. The Advisory Committee concluded that a mandatory rule was not necessary or clearly advantageous.[116] Granted that collateral estoppel alone would bar a second lawsuit in certain instances, a compulsory counterclaim may accomplish more if asserted against the plaintiff and others, by litigating the issues among *parties* and thus avoiding possible due process difficulties when collateral estoppel or res judicata is later pleaded. It seems necessary in this class of accident cases to supplement the natural pressures which would motivate a defendant to bring his counterclaim.

Mutuality

Where identical adversary parties seek to relitigate identical issues, estoppel may operate with perfect mutuality. Each party is bound by the prior judgment to the same extent as his opponent.[117] Where this classic symmetry is not present, courts have in varying degrees adopted an offensive-defensive distinction. Collateral estoppel may serve as a shield but not as a sword; it may be thus defensively invoked only against a former plaintiff.

The first of these has heretofore, with few exceptions, been assiduously observed in New York; the second has on occasion caused the courts some pause but was not followed in *Good Health Dairy Products Corp. v. Emery*.[118] The idea underlying the second limitation is that where a nonparty to the first action is permitted to use a judgment defensively against a prior party, the latter must have occupied the position of a former plaintiff who enjoyed the advantage of selecting the time, place and strategy for pursuing his claim. A defendant, by contrast, might default or exert only minimal opposition due to the inconvenience of the forum

114. Fed. R. Civ. P. 13(a).

115. N.Y. C.P.A. § 266 (now N.Y. C.P.L.R. § 3019(a)).

116. 1 N.Y. Adv. Comm. Rep. 69-70 (1957).

117. "The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it." Bernhard v. Bank of America, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942).

118. 275 N.Y. 14, 9 N.E.2d 758 (1937). But see the dissent in Elder v. New York & Pa. Motor Express, Inc., 284 N.Y. 350, 358, 31 N.E.2d 188, 192 (1940).

or the smallness of the claim. Therefore, he should not later be visited by the unanticipated consequences of his meager defense.

Such a restriction has not been a major deterrent to the availability of collateral estoppel in a jurisdiction adhering to mutuality. The offensive-defensive distinction was advocated on due process grounds for jurisdictions rejecting mutuality, for example California, as evidenced by *Bernhard v. Bank of America.*[119]

As to the restriction upon the offensive use of collateral estoppel, *Haverhill v. International Railway*[120] and *Elder v. New York & Pennsylvania Motor Express, Inc.*[121] expressed the rule that one not a party to the prior adjudication might invoke the plea defensively only, against a former plaintiff.

As stated earlier, if the parties in two suits involving the same cause of action are identical and are adversaries to each other, there is no problem in the assertion, affirmatively or defensively, of res judicata. But where new participants appear in a second and different cause of action, the doctrine of mutuality has been a limitation on those who may assert collateral estoppel, whereas privity restricts the class against whom the plea may be asserted.

The very narrow use that could be made of collateral estoppel, if the mutuality requirement were absolutely enforced, has led to certain well-founded exceptions: the indemnitor-indemnitee, master-servant and principal-agent relationships, and identity of issues as evidenced in the *Israel* case.[122]

The first exception is founded on the duty of the indemnitor to make good the loss suffered by the indemnitee through an adverse judgment. Such indemnity may arise out of contract, statute[123] or common law. A

119. 19 Cal. 2d 807, 122 P.2d 892 (1942); see Currie, Mutuality of Collateral Estoppel—Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281 (1957) (discussion of Justice Traynor's now famous analysis of the difference between the criteria governing the proponent and the opponent of the plea).

120. 217 App. Div. 521, 217 N.Y.S. 522 (4th Dep't 1926), aff'd mem., 244 N.Y. 582, 155 N.E. 905 (1927).

121. 284 N.Y. 350, 31 N.E.2d 188 (1940).

122. Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

123. An interesting case decided on the grounds of indemnification rather than collateral estoppel is Liberty Mut. Ins. Co. v. George Colon & Co., 260 N.Y. 305, 183 N.E. 505 (1932). The original law suit was by the administratrix against Colon for the wrongful death of her husband. The judgment for the plaintiff established the negligence of the defendant and, in the absence of contributory negligence, of the decedent. The employer's insurance carrier was thereupon obligated to pay $1000 into special funds under N.Y. Workmen's Comp. Law §§ 15(8)-(9) providing that an employer or his carrier shall make payments of $500 each into specified funds where no persons are entitled to compensation. The statute also provided for an assignment to the carrier of a cause of action for his payments into the funds.

contractual right of indemnification may obtain even though the indemnitor and indemnitee are primary and equally culpable tortfeasors with respect to the public to whom they owe a duty. Their liability is thus joint and several as is their duty. But as between the two, an arrangement may exist whereby the indemnitor has contracted to pay claims against the indemnitee.[124]

Common law indemnity or implied right of indemnification exists where different degrees of fault are present. In such cases, the secondary tortfeasor has a claim over against the primary tortfeasor if the former is held to respond in damages. Collateral estoppel has been available defensively to the secondary tortfeasor (indemnitee) where he is sued by the same party involved in a prior litigation resulting in the exoneration of the primary tortfeasor (indemnitor).[125]

Thereupon the insurance company sued the same defendant to recover these payments. The insurance company pleaded the judgment against defendant obtained by the administratrix as conclusive of the negligence of the defendant.

The appellate division in granting summary judgment for the plaintiff in the second action rested its decision on the right of the insurance carrier to be indemnified by the wrongdoer. "It is a familiar doctrine that one who has been compelled to pay a judgment recovered against him because of the wrongful act of a third person has an action over against such person; and where such third person has had notice of the former action and an opportunity to defend, the judgment is binding and conclusive upon him." 235 App. Div. 117, 121, 256 N.Y.S. 628, 632 (2d Dep't 1932).

The defendant in appealing the decision to the court of appeals argued that the judgment in the action by the administratrix imposed no liability on the insurance company. Neither did the defendant have any notice in the first action that the insurance company would make a claim, a claim which the insurance company did not possess at that time. The defendant viewed the appellate division decision as an alarming change in the law: "It will mean that in every accident case, where more than one person is injured, there need be but one trial of the issues by one injured party against the wrongdoer, and that judgment will be res judicata as to all other persons injured in the same accident." Brief for Appellant at 16, Liberty Mut. Ins. Co. v. George Colon & Co., 260 N.Y. 305, 183 N.E. 506 (1932).

The court of appeals affirmed summary judgment for the carrier in the second action on the grounds of a right of indemnification provided by the statute. The defendant's obligation as indemnitor was settled and could not be relitigated. The dissent was disturbed by the fact that the plaintiff in the second action, the insurance carrier, was not vouched in in the death action. "[T]he judgment in the death action has never established the defendant's liability in this action as defendant has never had a chance to defend himself against the statutory cause of action." 260 N.Y. 305, 314, 183 N.E. 506, 509 (1932).

124. See Hawley v. Davenport, R.I. & N.W. Ry., 242 Iowa 17, 45 N.W.2d 513 (1951).

125. The absentee owner of a vehicle against whom a judgment is rendered based on liability arising from statutes such as § 388 of the Veh. & Traf. Law has a right of indemnity against the driver of his vehicle. However, since the owner's automobile liability insurance covers permitted drivers, the insurance company would in effect be "paying itself." If the operator has liability insurance there may be some question of adjustment between the two insurance companies although presumably the owner's insurer would be the primary if not sole source of payment. If the judgment against the owner exceeds the coverage of his policy, he has a clear right of indemnification against the driver for the excess.

The derivative liability exception, encompassing master-servant and principal-agent relationships, operates where one is subject to liability for the culpable act of another. Thus, the master who is not at fault himself is answerable for the negligent act of his servant committed within the scope of the employment. Generally speaking, both or neither are liable. The Restatement position[126] has been that the master may take advantage only of a prior exoneration of his servant and the servant may not avail himself of a judgment for his master.[127]

The basic formula for this type of case is a first action by one alleging injuries against another's servant. The servant wins. The defeated plaintiff then sues the master, whose liability is dependent on the culpability of the servant. The master may assert the servant's judgment as a defense.[128]

These exceptions are not new. Judge Van Devanter writing in 1907 reviewed the venerable history of the derivative liability exception to mutuality:

> One of the earliest cases in which the question arose is Ferrers v. Arden, 2 Cro. Eliz. 668, which was trespass on the case for the conversion of an ox. The defendant pleaded that in a prior action for the same trespass, prosecuted by the same plaintiffs against other defendants, the latter had justified in his right and were acquitted, and it was held that, if the second action was for the same cause, the defendant's plea was good; for "although he be a stranger to the record, whereby the plaintiffs were barred, yet he is privy to the trespass, wherefore he well may plead it, and take advantage of it." In another relation, the same question arose in Biggs v. Benger, 2 Ld. Raymond, 1372, an action of trespass against two defendants. One made default, and the other pleaded that the act charged was done by him in the right of his codefendant and under the license of the plaintiff. The latter took issue on the plea, which was found against him, and it was held that the defendant who made default was entitled, on motion in arrest, to the benefit of the plea because it showed that the plaintiff could have no cause of action against him. . . . A leading case in this country is Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627, which was trespass quare clausum against one who had acted under the direction of his father. In a prior action by the plaintiff against the father for the same act the father, who admitted that the son acted under his direction, had been acquitted, and it was held that the son was entitled to the benefit of that adjudication. We quote from the opinion: "To permit a person to commence an action against the principal and to prove the acts alleged to be trespasses, to have

126. Restatement of Judgments § 96 (1942). The Elder case is in accord with this position. Some cases have permitted the primary actor to take advantage of a judgment for the derivatively liable party. See, e.g., Wolf v. Kenyon, 242 App. Div. 116, 273 N.Y.S. 170 (3d Dep't 1934); Bishop v. Downs, 18 App. Div. 2d 1127, 239 N.Y.S.2d 529 (4th Dep't 1963) (mem.); Planty v. Potter-DeWitt Corp., 27 App. Div. 2d 401, 279 N.Y.S.2d 938 (3d Dep't 1967). See generally Moore & Currier, Mutuality and Conclusiveness of Judgments, 35 Tul. L. Rev. 301 (1961).

127. Applying the analogy to the owner and driver in a motor vehicle accident case, the absentee owner has been permitted to assert defensively against a former party the judgment for his driver. Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937); Byrne v. Hasher, 275 N.Y. 474, 11 N.E.2d 304 (1937) (mem.).

128. Restatement of Judgments § 96 (1942).

been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so far as to admit it, when the same question has been decided and judgment rendered between parties responsible for the acts of others."[129]

The third exception to mutuality is based on an identity of issues. The former adjudication speaks conclusively upon the very issue raised in the second action. Such identity of issues is a prerequisite to collateral estoppel and it seems, therefore, inaccurate to categorize it as an exception. What is exceptional, however, is the reliance upon identity of issues alone without the additional presence of privity, indemnity or derivative liability. This special type of case will be discussed later.[130] Here, attention is focused on decisions based on a conjunction of identity of issues and derivative liability and the contrapuntal effect of the shield-sword doctrine.

Haverhill v. International Railway[131] reigned virtually unchallenged as the controlling decision in New York for many years. D1 sued O2[132] for personal injuries and won. Thereupon O1 sued O2 for property damage and obtained a directed verdict on the grounds that the negligence of the defendant and the freedom of negligence of D1 had been adjudicated. The appellate division reversed.[133] Since no privity existed between O1 and D1, there was no mutuality; furthermore, the plea could not be asserted affirmatively against a former defendant. Had the first judgment gone against the driver, O2 could not have employed his victory offensively in a suit against O1. The latter did not control the first action; he did not have his day in court.

Thus, one who could not be disadvantaged by another's adverse judgment might not as a plaintiff seek the benefit of another's favorable judgment against a former defendant. In a derivative case, the mutuality

129. Portland Gold Mining Co. v. Stratton's Independence, Ltd., 158 F. 63, 66 (8th Cir. 1907).

130. See text accompanying note 150 infra.

131. 217 App. Div. 521, 217 N.Y.S. 522 (4th Dep't 1926), aff'd mem., 244 N.Y. 582, 155 N.E. 905 (1927).

132. In the diagrammatic representations employed all parties owning, driving, occupying as passengers or insuring the first car will be represented by the postscript "1"; those associated with the second car will bear the postscript "2," etc. The alphabetical designations will be "O" for owner, "D" for driver, "P" for passenger and "Ir" for insurer. The symbol "J/" represents "judgment for." The Roman numerals "I" and "II" will indicate the first action and the second action respectively. Thus:

I. O1 v. O2 — J/O1

means that in the first action the owner of the first car sued the owner of the second car and judgment was rendered for the former.

133. 217 App. Div. 521, 217 N.Y.S. 522 (4th Dep't 1926).

rule could be relaxed only where the directly liable party was exonerated in a first action and the same plaintiff next sued the derivatively liable party. As a defendant in the second action, the derivatively liable party was permitted to employ collateral estoppel as a shield to protect himself from liability without the right of indemnity.

Good Health Dairy Products Corp. v. Emery[134] did not overturn the *Haverhill* rule but introduced one modification. In *Good Health*, the issues were the negligence and contributory negligence of both drivers. D1 sued O2 and D2 and recovered judgment.[135] O2 and D2 then sued O1 (absentee owner) and D1.[136] D1 could avail himself of collateral estoppel since he was a party to the first action. O1, the court of appeals held, could benefit by the former judgment even though she was not a party or privy to that judgment since her liability, if any, was derived solely from the acts of her driver and he had been adjudicated free of fault. Note that in this case defensive use is made of collateral estoppel against former defendants and that the judgment relied on exonerated the primary actor.

In *Elder v. New York & Pennsylvania Motor Express*[137] the issue was whether Elder, driver of the truck owned by the United States Trucking Corporation, could avail himself as plaintiff of a judgment for his employer arising out of a consolidated action in which each owner had claimed against the other. The appellate division relying on *Good Health*, permitted the plea,[138] finding that the same defendant had had full opportunity to litigate the determinative issues of negligence and contributory negligence adjudicated at the trial. The appellate division's reasoning was as follows:

> The basis of the holding in the *Good Health* case was that the one against whom the rule was sought to be enforced had had his day in court on the same issues and should not be permitted to relitigate them. There appears to us to be no good reason for applying the rule in favor of the person represented (Mrs. Emery in the *Good Health* case) whose liability was derivative, and refusing to apply it in favor of the driver (plaintiff in this case) whose negligence or freedom from negligence . . . solely determined his employer's liability.[139]

The court of appeals reversed.[140] While recognizing the *Good Health* decision as a means of avoiding inconsistency in or destruction of the right of indemnification between an exonerated driver and a liable owner,

134. 275 N.Y. 14, 9 N.E.2d 758 (1937).

135. See Appendix, p. 48 infra.

136. The counterclaim of O1 against O2 and D2 for property damage is omitted for the sake of simplicity.

137. 284 N.Y. 350, 31 N.E.2d 188 (1940).

138. 259 App. Div. 380, 19 N.Y.S.2d 553 (1st Dep't 1940).

139. Id. at 383, 19 N.Y.S.2d at 556.

140. 284 N.Y. 350, 31 N.E.2d 188 (1940).

the court combined the *Good Health* facts (driver exonerated first) and the *Haverhill* rule (defensive use only against a former plaintiff) and denied the plea of collateral estoppel.

Two examples of a combination of privity and identity of issues as a basis for departure from strict mutuality are *Bernhard v. Bank of America*[141] and *United Mutual Fire Insurance Co. v. Saeli.*[142] In *Bernhard* the defendant seeking to take advantage of the prior judgment was not a party to the first action, and the plaintiff sued in what appeared to be a different capacity in the former proceeding from her role in the subsequent action. The court ruled that collateral estoppel could be asserted against the plaintiff since, as beneficiary in the first action and administratrix in the second, she was in reality the same party in both. Identity of issues being present, the use of collateral estoppel by a defendant who would not have been bound to his disadvantage by a former judgment was permissible so long as the one estopped was a party or privy to the prior adjudication.

In the second case, Saeli (D2) sued Olney and Carpenter Corporation (O1) and Carpenter (D1) for personal injury and property damage arising out of a collision. D1 then instituted suit against D2 for personal injuries. The two actions were ordered tried together. Each driver alleged his freedom from contributory negligence and the other's negligence.

The jury brought in a verdict of no cause of action in the claim of D2; judgment was entered in favor of O1 and D1. In D1's claim against D2, the judgment was for D1. The insurer of O1 had paid for the damage to the car under a fifty dollar deductible policy, and was subrogated to O1's claim against D2. The third litigation therefore was the insurer's and owner's action for property damage. Special term granted, and the fourth department affirmed[143] judgment on the pleadings in favor of the plaintiffs. The entire case may be depicted as follows:

I.	D2	v.	O1, D1	— J/O1, D1
II.	D1	v.	D2	— J/D1
III.	Ir1, O1	v.	D2	— Ir1 and O1 may use J/O1, D1 and J/D1.

Had only I been tried without II, the verdict in favor of O1 and D1 might have been predicated on the negligence of both drivers, Carpenter and Saeli. "However, tried before the same judge, and with the same jury, was Carpenter's action, in which he sought a recovery for personal injuries

141. 19 Cal. 2d 807, 122 P.2d 892 (1942).

142. 272 App. Div. 951, 71 N.Y.S.2d 696 (4th Dep't 1947), aff'd mem., 297 N.Y. 611, 75 N.E.2d 626 (1947).

143. 272 App. Div. 951, 71 N.Y.S.2d 696 (4th Dep't 1947).

from Saeli growing out of this same collision. The jury's verdict in Carpenter's favor necessarily determined that Saeli was the sole one at fault for the collision. Since all three were parties to this single trial, took part in it, and since the same evidence furnished the basis for the jury's findings in each action, it seems almost sophistry to say that . . . it was not . . . forever determined, . . . that the one solely to blame . . . was Saeli."[144]

Several aspects of this decision are worthy of note. Offensive use of collateral estoppel was permitted against a former plaintiff-defendant; one of the parties invoking it was not a party to the first action. How might the insurer be classified?[145] Does the court treat him as a privy[146] although not in privity?[147]

The status of the plaintiff had importance since New York law in 1947 did not recognize as an exception to mutuality non-party, offensive use of collateral estoppel. No problem existed as to the status of the person against whom the plea was raised since he was a plaintiff in I and a defendant in II and III, that is, unless one relies more on the reservations expressed in *Elder* than the holding of *Good Health.* If there is privity,[148] there is nothing extraordinary about *Saeli;* if privity is lacking, *Saeli* resembles *B.R. DeWitt, Inc. v. Hall*[149] but without the aid of derivative liability.

The last major case to be considered in the development of exceptions to mutuality antedating *DeWitt*[150] is *Israel v. Wood Dolson Co.*[151] Unlike the others, it is not a negligence case arising out of a motor vehicle accident.

Plaintiff, a real estate broker, sued another real estate broker for one-half of a commission received by the latter upon the sale of property to one Gross. Plaintiff alleged a first cause of action against the broker for breach of a written agreement to share the commission if the realty in question were sold to a buyer introduced by plaintiff. A second cause of

144. Id. at 952, 71 N.Y.S.2d at 697.

145. Id. at 952, 71 N.Y.S.2d at 698.

146. J. Weinstein, H. Korn & A. Miller, supra note 98, at ¶ 5011.40, n.250.

147. F. James, Civil Procedure, 594 (1965).

148. The insurer (Ir1) in the Brief for Plaintiffs-Respondents at 8 describes the relationship between it and Olney & Carpenter (O1), in terms of a subrogee or assignee whose rights were dependent on its subrogor or assignor. As subrogee, it had no individual or personal rights against D2 but only the rights of its subrogor. The subrogee would have had no standing in court in the first action since no cause of action had accrued prior to its payment to the subrogee under the collision policy.

149. 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

150. Id.

151. 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

action was directed against the purchaser for intentionally inducing the second broker to breach his contract with the plaintiff. The two causes of action were severed and the claim against the second broker was tried first. A jury verdict in that case was set aside and the complaint dismissed on the ground that the plaintiff had not introduced the purchaser to the transaction and that the second broker consequently had not violated the contract.

Plaintiff then proceeded with his action against the purchaser; the latter pleaded as an affirmative defense the conclusiveness of the judgment in the first case. Special term denied his motion for summary judgment on the grounds that defendant Gross, not having been a party or privy to the first case could not claim the benefit of that judgment as an estoppel. The appellate division's reversal was affirmed by the court of appeals. The decision rested on the identity of issues in the two causes of action. To prove the second cause, plaintiff would have had to show a valid contract between him and the other broker, the purchaser's knowledge of the contract, a breach, and the purchaser's intentional inducement of the second broker to breach the contract. Since plaintiff failed to prove a breach in the first suit, he was barred from relitigating that issue.

The appellate division relied on the reasoning developed in the Restatement of Judgments, section 99, to the effect that a prior judgment "in favor of a person charged with the commission of a tort or a breach of contract bars a subsequent action" by the same plaintiff against another defendant whose liability is based upon inducing the identical tort or breach of contract. *Israel* represents a defensive use of collateral estoppel against a former plaintiff without, however, the additional presence of privity or derivative liability or indemnity.[152]

The first department in *Quatroche v. Consolidated Edison Co.*[153] confined *Israel* to a defensive use of collateral estoppel. Plaintiff, a passenger, pleaded affirmatively a former judgment for the owner and operator of her vehicle against the same defendant.[154] Since the passenger was not a party in the former adjudication, that judgment "neither precludes the plaintiff nor establishes the defendant's liability in this action."[155] But in *Kinney v. State*,[156] the passengers in the second car employed offensively

152. A case similar to Israel is American Button Co. v. Warsaw Button Co., 31 N.Y.S.2d 395 (Sup. Ct. 1941), aff'd mem., 265 App. Div. 905, 38 N.Y.S.2d 570 (4th Dep't 1942). See Eissing Chem. Co. v. People's Nat'l Bank, 205 App. Div. 89, 199 N.Y.S. 342 (2d Dep't), aff'd mem., 237 N.Y. 532, 143 N.E. 731 (1923).

153. 11 App. Div. 2d 665, 201 N.Y.S.2d 520 (1st Dep't 1960).

154. See Appendix, p. 50 infra.

155. 11 App. Div. 2d at 665, 201 N.Y.S.2d at 521.

156. 191 Misc. 128, 75 N.Y.S.2d 784 (Ct. Cl. 1947).

a prior judgment for the passengers of the first car based on the same negligent act of the state.

B.R. DeWitt, Inc. v. Hall,[157] holds that a derivatively liable absentee owner of a motor vehicle may plead affirmatively a former judgment exonerating his driver. The case may be diagrammed as follows:

I.	D1	v.	O2	— J/D1
II.	O1	v.	O2	— O1 may use J/D1

In the first action, DeWitt's (O1's) driver sued for personal injuries and won. In the second case special term granted O1's motion to strike the first affirmative defense[158] and for summary judgment on the ground that the applicability of collateral estoppel does not rest upon the fact that a party has not tried an issue against a particular adversary. Rather, the controlling factor is identity of issues.[159]

The appellate division reversed, believing itself bound by the *Elder*[160] and *Minkoff*[161] decisions, and limiting the authority of *Israel*[162] to defensive collateral estoppel in the context of identity of issues. The dissent of Justice Goldman,[163] however, distinguished the factual situation in *Minkoff* which involved a subsequent suit between former co-defendants. In the instant case, O2 was an adversary in D1's personal injury action with "full opportunity" to contest the issues of negligence and contributory negligence. His liability for property damage depended directly on the same issue. The "absolute" identity of issues[164] and the defendant's adversarial participation in D1's action combined to give him his day in court.[165]

The court of appeals in reversing the appellate division announced that mutuality is dead, and overruled "at least *Haverhill*."[166] Reviewing the

157. 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967), rev'g mem. 24 App. Div. 2d 831, 264 N.Y.S.2d 68 (4th Dep't 1965).

158. Defendant alleged that O1 had received payment from his insurer under a collision policy and that the cause of action was thereby assigned to the insurer and O1 was not the real party in interest.

159. The court cited: Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956); United Mut. Fire Ins. Co. v. Saeli, 297 N.Y. 611, 75 N.E.2d 625 (1947) (mem.); Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937).

160. 284 N.Y. 350, 31 N.E.2d 188 (1940).

161. 10 N.Y.2d 1030, 180 N.E.2d 434, 225 N.Y.S.2d 47 (1962).

162. 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

163. 24 App. Div. 2d 831, 832, 264 N.Y.S.2d 68, 69 (4th Dep't 1965) (mem.).

164. O2 contended in his brief that different issues might arise in the property damage action, e.g., a mechanical defect known to O1 but not to D1, Brief of Defendant-Respondent at 4, B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

165. This criterion is ably developed in Brief for Appellant, B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

166. 19 N.Y.2d 141, 147, 225 N.E.2d 195, 198, 278 N.Y.S.2d 596, 601 (1967).

trend of recent decisions,[167] Judge Scileppi focused on two considerations: identity of issues and full opportunity to litigate them in the prior action by the party against whom the estoppel was sought to be asserted.

> In this case, where the issues, as framed by the pleadings, were no broader and no different than those raised in the first lawsuit; where the defendant here offers no reason for not holding him to the determination in the first action; where it is unquestioned (and probably unquestionable) that the first action was defended with full vigor and opportunity to be heard; and where the plaintiff in the present action, the owner of the vehicle, derives his right to recovery from the plaintiff in the first action, the operator of said vehicle, although they do not technically stand in the relationship of privity, there is no reason either in policy or precedent to hold that the judgment in the *Farnum* case is not conclusive in the present action. . . .[168]

Some of the questions not answered by *DeWitt* are: may a primary actor (driver, servant) affirmatively appropriate a judgment for a derivatively liable party (owner, master) against the same defendant? May a driver or owner offensively assert a judgment for a passenger or a passenger the judgment for a driver, owner or other passengers? May a bystander affirmatively or defensively use a judgment for an owner, driver or passenger? Where do *Israel* and *DeWitt* lead when there is no privity, no derivative liability but solely identity of issues and a litigational "privity" between the judgment winner and a new party seeking to benefit from that judgment?

Passengers

Passengers heretofore have been a class, sui generis, not invited to partake at the communal table where judgments are shared. The case expressing the New York view that a driver may not appropriate a judgment for his passenger to estop a subsequent claim against him is *Daly v. Terpening*.[169] Terpening (D1) sued Daly (D2) for his own personal injuries and property damage. He sued D2 also an administrator for the estate of his wife, a passenger (P1). The actions were tried together and resulted in a final judgment for P1 in the second action and a final judgment for D2 in the first action. D2 then brought a suit for her personal injuries and property damage against D1; the latter interposed the de-

167. As a foundation for its holding the court cited: Cummings v. Dresher, 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966); Hinchey v. Sellers, 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956); United Mut. Fire Ins. Co. v. Saeli, 297 N.Y. 611, 75 N.E.2d 625 (1947) (mem.); Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937).

168. 19 N.Y.2d at 148, 225 N.E.2d at 199, 278 N.Y.S.2d at 601-02.

169. 261 App. Div. 423, 26 N.Y.S.2d 160 (4th Dep't), aff'd mem., 287 N.Y. 611, 39 N.E.2d 260 (1941).

fense of "res judicata." The plea was denied. The case may be represented thus:

I.	D1	v.	D2	— J/D2
II.	P1 (by D1)	v.	D2	— J/P1
III.	D2	v.	D1	— D1 may not use J/P1

The court reasoned as follows:

> The positions of the driver and the passenger in the automobile are different and quite often the passenger and driver differ not only in knowledge of the operation of the car [but] . . . in appreciation of the conduct of other drivers in their then traffic . . . . Mrs. Daly may have given some signal . . . that would have advised the driver of the other car of the manner in which she intended to operate her car, and insofar as that driver is concerned the conduct of Mrs. Daly would not necessarily be negligence . . . and yet such conduct or action unknown or unappreciated by the passenger would result in a situation in which the operation of the car by Mrs. Daly would be causative negligence insofar as the passenger . . . was concerned.[170]

The court observed that there was no mutuality of estoppel. The parties in II and III were not the same; in the third action, D1 appeared in his individual capacity, while in the second action he was acting as administrator of his wife's estate. And of course, no privity existed between D1 (husband) and P1 (wife).

In an earlier case[171] the driver did not attempt to use his passenger's judgment but rather his own prior judgment obtained against the owner of the other vehicle. The case can be represented in this way:

I.	OD1	v.	O2	— J/OD1
II.	P2	v.	OD1, O2	— OD1 may not use J/OD1

Although in I the owner-driver proved that the accident was caused solely by the negligence of O2's driver, P2 was free to prove in the second case that OD1 was negligent as to her.[172] Thus, the passenger was not precluded from suing the formerly exonerated driver as well as the culpable bus owner, O2. The freedom from negligence of the first driver vis-à-vis the second driver did not establish the former's freedom from negligence vis-à-vis the passenger of the second driver.[173]

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170. 261 App. Div. 423, 426-27, 26 N.Y.S.2d 160, 163-64 (4th Dep't 1941).

171. Neenan v. Woodside Astoria Transp. Co., 261 N.Y. 159, 184 N.E. 744 (1933).

172. Id. at 164, 184 N.E. at 746.

173. Sullivan v. Gist, 159 F. Supp. 928 (E.D. Pa. 1958) involved passengers in both cars, as well as drivers and owner. Diagrammed it reads:

I. D1 v. D2 —J/D1
II. P1 v. O1, D2 — J/P1 against D2 only
III. P2 v. D2
D2 impleaded O1 — O1 may use J/D1

Whether as a projection of *Cummings v. Dresher*[174] the passengers and driver of one vehicle will be permitted greater freedom in sharing each other's judgments is conjectural.[175] Perhaps the burden will be placed on the party opposing collateral estoppel to prove that he exercised different degrees of care as to his counterpart driver and that driver's passenger. Whether the passenger or driver of the first car may offensively or defensively use a prior judgment against a passenger or driver of the second car is even more complex and speculative. Even assuming that *Daly* has been overruled sub silentio by *Cummings*, the courts may not be willing to go that far.

A second type of situation involving the borrowing of a judgment by one not in privity and not in a derivative relationship to a participant in the former adjudication is the multiple passenger case.[176] New York has thus far not permitted a passenger to assert a former judgment for a fellow passenger against the same defendant.[177]

However, a recent case of considerable magnitude, *United States v. United Air Lines, Inc.*[178] may portend a modification of New York law. The litigation arose out of a collision of a United Air Lines plane with a military jet in Nevada killing all passengers and crew members. Suits were filed in eleven jurisdictions in the United States. Twenty-four suits by survivors-heirs were filed in the Southern District of California, seven in Nevada and one in the Eastern District of Washington. All of the cases filed in the Southern District of California were consolidated for trial. A jury verdict was rendered for the plaintiffs on the issue of negligence. The plaintiffs in Nevada and Washington first moved for a transfer to the Southern District of California, and subsequently for summary judgment on the issue of liability. Thus, the plaintiffs who were not parties or privies

174. 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

175. See discussion p. 37 infra.

176. See 35 Yale L.J. 607, 612 (1926).

177. Bisnoff v. Herrmann, 260 App. Div. 663, 23 N.Y.S.2d 719 (2d Dep't. 1940). The court took the occasion to state the law respecting derivative liability and mutuality as of 1940: "Where, as here, there is no privity or relationship approximating privity, a judgment cannot be res judicata, even as a defense, in favor of one who was not a party and who would have not been bound had the judgment been adverse." Id. at 666, 23 N.Y.S.2d at 722.

178. 216 F. Supp. 709 (D. Nev. 1962), modified, 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964). See also Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), cert. denied, 377 U.S. 934 (1964). The court's construction of a labor contract and defendant's liability under it inured to the benefit of the second group of plaintiff-employees (not parties to the first action) against the same defendant. The Zdanok (first) suit involved 5 employees suing for seniority rights; the Alexander (second) suit (pending in state court) involved 160 employees. After defendant's liability was established on the first Zdanok appeal and the case remanded to the district court for assessment of damages, the Alexander state action was dropped, re-instituted in federal district court and consolidated with Zdanok.

in the California case sought to assert that judgment affirmatively against the same defendant. Obviously mutuality was lacking. The court adopted the test of *Bernhard v. Bank of America:*[179] Was the issue identical? Was there a final judgment on the merits? Was the prior judgment asserted against a party or privy to that judgment? The court answered all three questions in the affirmative.[180]

The court considered the following additional aspects of the case. The California litigation[181] involved the major part of the total liability of United Air Lines to survivors of the passengers, the judgments in that case amounting to over two million dollars. Thus, defendant was alerted to the full potentialities of the controversy and had every incentive to prepare and try the case with the utmost skill.

The court described the thoroughness of the proceedings:

a) Depositions were taken throughout the country.
b) Many hundreds of interrogatories were submitted by the parties to each other.
c) Pre-trial proceedings consumed eight days terminating in an order 19 pages in length.
d) Of the 69 trial days, but three were devoted to the plaintiff's direct case.
e) Summations to the jury occupied four days.
f) Instructions to the jury were argued for seven days.[182]

The court concluded that the defendant was collaterally estopped by virtue of the judgments in the California cases to deny the liability to plaintiffs in this case.[183] Since the defendant had "participated in a full, fair adversary proceeding and has had a full opportunity to present its case and has fully presented its case in the Wiener trial on liability," the doctrine of mutuality of estoppel did not apply.[184]

It may be argued that the *United Air Lines* decision should be limited to catastrophic cases of this kind[185] where the instantaneous deaths of all passengers could scarcely permit a measuring of different degrees of fault to each. The court was impressed by the completeness and the fairness of the opportunity of the defendant to interpose every possible fact or

179. 19 Cal. 2d 807, 122 P.2d 892 (1942).
180. 216 F. Supp. at 727-32.
181. United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), aff'g 237 F. Supp. 90 (S.D. Cal. 1964).
182. 216 F. Supp. at 730-31.
183. Id. at 731.
184. United States v. United Air Lines, Inc., 216 F. Supp. 709, 731.
185. But see Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1966).

inference in its favor. Thus the determination did not rest on any superficial application of the *Bernhard* formula. But in applying the criteria which have supplanted mutuality the court emphasized the due process requirement of a full day in court.

Issues

The discussion thus far has utilized the term "identity of issues" without refinement of analysis. The recent cases examined in the text illustrate the increasingly important role assigned to the identity factor, as restrictions embodied in mutuality have been relaxed and abandoned. The standard formulation of the rule is that issues must be (a) identical, (b) actually litigated and (c) necessarily determined. Possibly the most difficult aspect is the first, since this must be concerned, more fundamentally than the others, with the question: What is an issue? Is it an ultimate fact or may it, in some cases, constitute evidentiary findings of ultimate significance? *Hinchey v. Sellers*[186] reviewed subsequently focuses on identity of issues.

That preclusionary effect attaches only to questions adversarially contested is an incident of collateral estoppel,[187] dictated by the potentialities of abuse inherent in the doctrine. The effect of a failure to deny an allegation of the complaint or of an express admission of some or all allegations in the pleadings has been generally confined to the particular case.[188] It is not so clear whether an issue is actually litigated if it is put in issue by the pleadings and later admitted, or a stipulation is entered into by the parties so that no proof is submitted on that fact. In determining what is actually litigated, reference will often be necessary to the record of the prior case and perhaps even to matters outside the record.

A judgment based upon the consent of the parties rather than a trial of the facts produces no actually litigated issues. Yet in New York, such a judgment is generally given res judicata and collateral estoppel effect.[189] The same conclusion, that no issues have been litigated, is obviously applicable to judgments by default. It is logical to accord such judgments

186. 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959).

187. See Southern Pac. R.R. v. United States, 168 U.S. 1, 48-49, 52-53 (1897); Cromwell v. County of Sac, 94 U.S. 351, 353 (1876); Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929); Restatement of Judgments § 68, comments a, c, d (1942); 2 Freeman § 677 (5th ed. 1925); Note, Collateral Estoppel by Judgment, 52 Colum. L. Rev. 647 (1952).

188. See N.Y. C.P.L.R. § 3123(b); Restatement of Judgments § 68, comments f, g (1942).

189. 5 J. Weinstein, H. Korn & A. Miller, New York Civil Practice at ¶ 5011.31. But see General Analine & Film Corp. v. Bayer Co., 305 N.Y. 479, 113 N.E.2d 844 (1953). A decision rendered but not entered (the parties having settled in the interim) was held to be not res judicata. Mandracchia v. Russo, 53 Misc. 2d 1018, 280 N.Y.S.2d 429 (Sup. Ct. 1967).

bar and merger effect. To permit a default judgment potentially more pervasive sequelae through issue binding, however, is a more serious due process problem than some of the others which have engaged the attention of the courts in this area. All that the defendant may be admitting by his default is that he would rather pay a small claim, or seek to elude the enforcement of a claim, than submit to a trial.

The criterion of actual litigation has become entangled in the confusion surrounding identical causes of action. While in many cases, such as the multiple stages of a marital dispute or a complex will or contract, it may be an intricate matter to determine what facts were actually litigated, this is not the case in the usual motor vehicle accident in which the ultimate facts are negligence, contributory negligence, permission and proximate cause.[190] There is, therefore, less mystery concerning what is actually litigated in the typical accident case, and the actually litigated rule ought to be sensibly applied without hypertechnicalities. The actual litigation requirement has not been strictly adhered to in New York.[191]

The criterion that an issue must have been necessarily determined in the first action to possess potentially binding effect in the second action may cause more difficulties in accident cases.[192] The problem arises where judgment is for the defendant upon a general verdict. Matters found against the winning party are not matters on which the judgment necessarily depends and are, of course, not appealable.[193] It is not a particularly helpful definition to state that the necessarily determined issue must be a material fact and that an estoppel will not operate as to facts on which the judgment did not depend. It is apparent that in many types of cases adherence to the "necessarily determined rule" is essential to prevent cutting off rights which the party in the first action had no intention of putting at stake. The approach expressed in the following passage is especially germane to accident litigation:

> But there is a difference between a finding or adjudication which is immaterial and one which is material, though perhaps unnecessary in view of other findings. The mere fact that the court goes further than is absolutely necessary to sustain its judgment in determining material issues presented to it does not prevent such issues from becoming res judicata . . . . All that is necessary is that the point or matter in question, if a material one, should have been actually considered and determined.[194]

190. For a variable approach to what is the same cause of action see W. E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, 92 F. Supp. 112 (E.D.N.Y. 1950), aff'd, 186 F.2d 236 (2d Cir. 1951); Statter v. Statter, 2 N.Y.2d 688, 143 N.E.2d 10, 153 N.Y.S.2d 13 (1957).

191. Note, Collateral Estoppel in New York, 36 N.Y.U.L. Rev. 1158, 1172-76 (1961).

192. See pp. 37-42 infra.

193. 2 Freeman, supra note 187, at § 697.

194. 2 Freeman, supra note 187, at § 698. It is also stated in this passage that "one who claims a finding was not material to the issues has the burden of showing it." Id.

It may be that the law of New York is tending towards acceptance of, for collateral estoppel purposes, either issues actually litigated or issues necessarily determined (in the narrow sense) as binding upon a subsequent cause of action.

Cutting across both the "identity" and "necessarily determined" prerequisites is the evasive distinction between ultimate and evidentiary fact. Judge Learned Hand in *The Evergreens v. Nunan*[195] is the recent source for the evidentiary-ultimate fact demarcation[196] in the context of the New York "rule" that only ultimate facts may have conclusive effect in subsequent litigation. The opinion defines an ultimate fact as "one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question."[197] "Mediate datum" (evidentiary fact), on the other hand, it defines as the basis for a rational inference of ultimate fact.

But whether the fact in the first proceeding is ultimate or mediate matters little according to the theory developed in the opinion. Such proposition to be conclusive in subsequent lawsuits must have been "necessary to the result" in the first suit.[198] A caveat is issued in applying this guide. Since it is impossible to anticipate the future significance of facts, it is unduly harsh, according to Judge Hand, to give binding effect to every fact decided in a prior case between the parties, even though their determination was essential to the decision.[199]

What seems to be of more moment than the classification assigned to the projected proposition is the category of fact it acts upon in the second lawsuit. In Judge Hand's view, neither an ultimate nor an evidentiary fact in the first case may establish mediate data in the second.[200]

Two multi-stage New York cases illustrate the difficulties attending application of the issues requirements in determining owner's liability.[201] *Fox v. Employers' Liability Assurance Corp.*[202] considered the following question: Is a prior adjudication that the operation of a car was without the owner's permission, as the statute has been construed by the courts,

195. 141 F.2d 927 (2d Cir.), cert. denied, 323 U.S. 720 (1944).

196. Earlier references are to "matters in issue" rather than to ultimate fact. The matters in issue are the essential elments of a cause of action or defense which must be pleaded; they are distinguished from matters which are merely to be proved, or are in controversy in the evidence. See 36 N.Y.U.L. Rev. 522, 523 (1961).

197. The Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir. 1944).

198. Id.

199. Id. at 929.

200. In prior litigation, the fair market value of petitioner's fully improved land was decided. In the instant controversy, the government refused to be guided by that determination in assessing the fair market value of petitioner's partially improved land, 47 B.T.A. 815 (1942).

201. For discussion of the issue of permission in single-stage litigation see pp. 4-11 supra.

202. 239 App. Div. 671, 268 N.Y.S. 536 (4th Dep't 1934).

decisive on the issue of permission as defined in the coverage clause of an insurance policy? Applying the statutory standard[203] in the first *Fox* case,[204] the court determined that only the defendant driver could be held for injuries to the plaintiffs, since his use of a city car on this occasion was without permission.

When the execution issued against the defendant was returned unsatisfied, plaintiffs sued the city's insurance carrier.[205] The latter pleaded the first judgment as res judicata on the issue of permission. The court did not permit the plea; it reasoned that absence of statutory consent did not determine absence of permission by the terms of the insurance policy. That question involved the intendment of the contracting parties and the scope of the coverage. In other words, the facts did not warrant imposition upon the owner (the city) of statutory liability for its negligent driver; but in a contract action to construe the liability insurance policy, the same facts might or might not accord with "permission"[206] as defined by the coverage clause. Therefore, all of the facts had to be presented anew in a second trial.[207]

The various stages of litigation in *Hinchey v. Sellers*[208] pertain to the liabilities of the driver, owner and insurer of a car which left the road near Sennett, New York, resulting in the death of the two passengers. The car was owned by Orville Sellers, a resident of Pennsylvania and insured under a liability policy issued in Pennsylvania. Sellers had turned the car over to his son, Donald, for use at his station, Sampson Air Force Base. The son had, on previous occasions, taken other service men as passengers in his car and loaned his car to others to drive.

On this particular occasion, one of the prospective passengers had requested the use of the car to drive to the State Fair at Syracuse. Donald refused upon learning that one O'Rourke was to accompany them.[209] The

203. N.Y. Veh. & Traf. Law § 59 (now N.Y. Veh. & Traf. Law § 388).

204. Fox v. City of Syracuse, 231 App. Div. 273, 247 N.Y.S. 429 (4th Dep't 1931), aff'd, 258 N.Y. 550, 180 N.E. 328 (1931).

205. 239 App. Div. 671, 268 N.Y.S. 536 (4th Dep't 1934).

206. Id. at 672-74, 268 N.Y.S. at 538-40.

207. At the second trial, based on essentially the same facts adduced at the first trial, the court held the insurer was not liable for payment to the plaintiffs on account of the driver's negligence, since the latter's use was not permitted within the terms of the insurance contract. 239 App. Div. 671, 268 N.Y.S. 536 (4th Dep't 1934).

208. Hinchey v. Sellers, 1 Misc. 2d 711, 147 N.Y.S.2d 893 (Sup. Ct. 1955), rev'd, 5 App. Div. 2d 440, 172 N.Y.S.2d 47 (4th Dep't), reargument denied, 6 App. Div. 2d 757, 174 N.Y.S.2d 455 (4th Dep't 1958), rev'd, 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959).

209. The refusal was not based on O'Rourke's incompetence as a driver; Donald testified to the contrary. Proceedings in New Hampshire, Record at 89. Rather, he refused because

passenger thereupon assured Donald that O'Rourke would not make the trip and, owing to this assurance, Donald transferred the car keys to the passenger. O'Rourke not only joined the excursion but was at the wheel when the fatal accident occurred.

The administrators of the two passengers instituted negligence actions against O'Rourke in New Hampshire, the state of his residence; the insurer refused to defend on the ground that the car was being used without permission of the owner. The administrators then petitioned the New Hampshire court for a declaratory judgment to establish that the car was driven with the owner's permission and that the insurer was liable under the policy issued to the owner. The issues were heard by the court without a jury. The superior court made a detailed statement of findings including these crucial facts: Donald gave permission on condition that O'Rourke would not be a passenger; Donald did not have knowledge of the violation of the condition until informed of the accident.

The superior court transferred the case to the Supreme Court of New Hampshire certifying four questions of law: (1) Was the coverage of the liability insurance to be determined by New York or Pennsylvania Law? (2) Was the use of the car with permission of the insured? (3) Was the defendant insurer obligated to cover the driver under the policy? (4) Was the insurer obligated to pay claims or defend actions resulting from the accident?[210]

The supreme court held that Pennsylvania law governed the interpretation of the terms of the policy, which limited coverage to the named insured and "to any person while using the automobile . . . provided the actual use . . . is by the named insured or with his permission."[211]

In view of the superior court's findings that permission was conditioned on O'Rourke's absence, the car at the time of the accident was "neither actually nor impliedly [used] within the limits of the permission granted by Sellers . . . ."[212] The use was non-permissive within the meaning of the terms of the liability policy. Therefore, the insurer was not obligated to provide coverage to the driver or to pay claims arising from the accident. The superior court entered a decree in conformance with the supreme court's rulings.

The administrators voluntarily discontinued the tort actions in New

O'Rourke was limited to the base as a result of an infraction of rules, and Donald feared he might be court-martialed if he assisted O'Rourke in voliating the restriction. Id. at 105.

210. Hinchey v. National Sur. Co., 99 N.H. 373, 376, 111 A.2d 827, 830 (1955).

211. Since the father had transferred the car to Donald under a "broad authority," "anyone driving with Donald's permission was also driving with the permission of the . . . named insured." Id. at 377, 111 A.2d at 830.

212. Id at 379, 111 A.2d at 831. The court distinguished the factual situation from Arcara v. Moresse, 258 N.Y. 211, 179 N.E. 389 (1932).

Hampshire against O'Rourke, and instituted suit against Orville and Donald Sellers in the Supreme Court of New York.[213] Defendants alleged as a defense the New Hampshire declaratory judgment for the insurer and moved for summary judgment. The court found that the same determination—that permission was granted on condition that O'Rourke not be a passenger—would bar plaintiff's recovery against the owner under New York law[214] as it had barred plaintiff's recovery against the insurer. Plaintiff having had a complete trial in New Hampshire on the issue of permissive use "should not now have a second opportunity to establish the same facts they failed to prove the first time."[215] The judgment for the indemnitor could be asserted by the indemnitee.

The fourth department reversed[216] on the ground that collateral estoppel was not available in the absence of identity of issues. The issue in the New Hampshire proceedings, noted Justice Halpern, was permissive use under the terms of the liability insurance and rested on the intent of the parties. In the instant action, permissive use was to be determined in accordance with the intent of the legislature as expressed in section 59 of the Vehicle and Traffic Law. Since the ultimate fact of permission was not identical, plaintiffs were not estopped from "relitigating the underlying evidentiary questions bearing upon the ultimate issue of . . . permission. . . ."[217] The conflicts of laws problem was disposed of in two steps: a determination that New Hampshire law controlled the effect to be given evidentiary findings, followed by a determination that New Hampshire law was substantially the same as New York on this point.

The court of appeals, reversing, did not supply a guide for distinguishing ultimate fact from evidentiary fact.[218] The finding in the New Hampshire case that the permission was predicated on O'Rourke's not being a passenger "was not a fragmentary finding of an evidentiary fact" but one "from which the resolution of the ultimate legal issue necessarily followed."[219] Although the ultimate issue was different in New York, the same conclusion of non-permissive use would flow from a retrial of all of the same operative facts. The Supreme Court of New Hampshire had concluded that the findings of a specifically conditioned permission

213. 1 Misc. 2d 711, 147 N.Y.S.2d 893 (Sup. Ct. 1955), rev'd, 5 App. Div. 2d 440, 172 N.Y.S.2d 47 (4th dep't 1958), rev'd, 7 N.Y.2d 87, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959).

214. N.Y. Veh. & Traf. Law § 59 (now N.Y. Veh. & Traf. Law § 388).

215. 1 Misc. 2d at 716, 147 N.Y.S.2d at 898.

216. 5 App. Div. 2d 440, 172 N.Y.S.2d 47 (4th Dep't 1958), rev'd, 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959).

217. Id. at 447, 172 N.Y.S.2d at 54. The court refers to The Evergreens v. Nunan, 141 F.2d 927 (2d Cir.), cert. denied, 323 U.S. 720 (1944).

218. 7 N.Y.2d 287, 293, 165 N.E.2d 156, 159, 197 N.Y.S.2d 129, 133 (1959).

219. Id.

was "unquestionably warranted by the evidence."[220] The terms of the permission having been fully litigated, firmly established and necessary to the former decision for the indemnitor, the plaintiffs were estopped from relitigating the same facts in their action against the indemnitee.

If one adopts the definition that an evidentiary fact is a "proposition to which no legal consequences immediately attach"[221] but "affords some logical basis—not conclusive—for inferring some other fact"[222] and that a statement of ultimate fact "describes the very event to which legal consequences attach,"[223] then the presence or absence of permission was an ultimate fact in *Hinchey* and the testimony establishing the terms of use constituted evidentiary fact.[224]

Hinchey appears to hold that facts necessary to the result may be conclusive in a later claim between parties or their privies even though the facts are not ultimate in the first action. *Hinchey*, however, involves a situation in which all of the evidentiary facts necessary to prove the ultimate fact in the New Hampshire action were also necessary to prove the ultimate fact in the New York suit.[225]

Certainly the evidentiary facts supporting a finding of permission or the absence of permission are vital enough under statutes similar to New York's section 388 and under the common coverage clauses of liability policies to warrant the most scrupulous attention of counsel in a vehicle accident case. If, therefore, the exact nature of the permission is settled in an earlier-tried cause of action against the indemnitee or indemnitor, according such facts estoppel effect should not occasion cries of surprise that one is bound on a collateral matter he did not contest vigorously.[226] Ownership of a vehicle and the conditions attached to permission are

220. Hinchey v. National Sur. Co., 99 N.H. 373, 378, 111 A.2d 827, 831 (1955).

221. Morris, Law and Fact, 55 Harv. L. Rev. 1303, 1326 (1942).

222. W. Hohfeld, Fundamental Legal Conceptions 34 (1920).

223. Morris, supra note 221, at 1326.

224. "The distinction between propositions of fact and conclusions of law is that: propositions of fact are descriptive; conclusions of law are dispositive. Propositions of fact state history; conclusions of law assign legal significance to that history." Morris, supra note 221, at 1329. Brief for Defendants-Appellants (the Sellerses) at 40 suggests that three steps are involved in issue determination: (1) a finding of evidentiary facts, (2) a finding of ultimate facts and (3) application of the law to the ultimate facts producing a decision on the ultimate issue. The New Hampshire court reached a finding of ultimate fact—no permission. The Appellants contended that the New York court had only to apply New York law to the ultimate facts to reach a conclusion as to permission under N.Y. Veh. & Traf. Law § 59 (now N.Y. Veh. & Traf. Law § 388).

225. Restatement of Judgments § 69, comment p (1942 and 1948 Supp.); for New York recognition of the estoppel effect of a Virginia judgment, see Peare v. Griggs, 7 App. Div. 2d 303, 182 N.Y.S.2d 878 (1st Dep't 1959).

226. Permission is a "matter in issue," an essential element of the cause of action and is not collateral or incidental. 2 Freeman, supra note 187, at §§ 690, 691.

examples of important evidentiary facts which are necessary antecedents to a determination of liability. Once fairly tried and decided they should be available to the proper parties in a subsequent case.[227]

The effort to formulate a comprehensible distinction between evidentiary and ultimate facts has not been fruitful. This differentiation may affect either the identity of issues requirement and/or the necessarily determined rule. Perhaps there is too much variation in the degrees of importance attributable to different categories of evidentiary fact ranging from the almost irrelevant detail to the almost singly decisive proposition. In a case such as *Hinchey*, where the absentee owner is sued, ownership of the vehicle, permission to another to use the vehicle, the driver's negligence and its causal relation to the plaintiff's injury are all indispensable steps to a final judgment of liability or no liability. Consequently, the approach of the court of appeals should be followed, and estoppel effect should be accorded the determination of the factual basis of permission once it has been fully tried.

Cummings v. Dresher

The case of *Cummings v. Dresher*[228] presents at once the thorniest problems of collateral estoppel: the actually litigated, necessarily determined issue,[229] the identity of issues and the relationship of parties invoking or contesting the binding effect of a prior adjudication.

The state court action instituted by the driver (D2) and owner (O2) of the Cummings car (car 2) against the driver (D1) and owner (O1) of the Dresher car (car 1)[230] was preceded by two law suits against the Cummingses in federal district court,[231] in which the plaintiffs were D1 and his passenger (P1).[232] D1 and P1 sued individually for personal

227. See New York State Labor Relations Bd. v. Holland Laundry, 294 N.Y. 480, 493, 63 N.E.2d 68, 74 (1945).

228. 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966); see Note, 52 Cornell L.Q. 724 (1967); 35 Fordham L. Rev. 559 (1967).

229. The issue of permission was absent from the case, it being conceded that Bernard Dresher operated car 1 with the permission of the owner, Standard Electric Co., although not at the time on the business of the corporate owner, and that Mary Cummings operated car 2 with the permission of the owner, Martin Cummings, her husband.

230. 43 Misc. 2d 556, 251 N.Y.S.2d 598 (Sup. Ct. 1964), aff'd mem., 24 App. Div. 2d 912, 264 N.Y.S.2d 430 (3d Dep't 1965), rev'd, 18 N.Y.S.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

231. 325 F.2d 156 (2d Cir. 1963). Since the amount in controversy exceeded $10,000 and since the Dreshers were residents of Montreal and the Cummingses residents of New York, jurisdiction was based on diversity.

232. Another member of the Dresher family, a passenger in the back seat of car 1, escaped injury and appeared as witness for Bernard Dresher corroborating his version of the accident.

injuries; the cases were tried before the same district judge and jury but were *not* consolidated.

Testimony adduced at the trial of the D1's and P1's claims exhibited sharp conflicts over the facts of the collision.[233] Each driver vigorously contended his own freedom from negligence and the other's lack of due care. In his charge, District Judge Foley instructed the jury to consider the two causes of action separately.[234] He also explained to the jury that the passenger (P1) might recover if he was not negligent even though the driver (D1) was found negligent.[235] At the end of the charge, the judge again cautioned the jury: "Keep your verdicts separate . . . . Consider the evidence separately as to each of the plaintiffs . . . ."[236]

The district court jury rendered a verdict for P1 in his action against O2 and D2. But in D1's suit, the jury responded: "We find the defendant [D2] guilty of negligence and the plaintiff [D1] guilty of contributory negligence to a very minor degree."[237] The court requested the clerk to ask the jury if their decision was no cause of action in favor of O2 and D2, and the jury replied affirmatively.[238] D1 unsuccessfully appealed the decision rendered against him.[239] O2 and D2 did not appeal from the judgment for P1.

In the New York Supreme Court proceedings commenced in 1961, O2 and D2 alleged three causes of action against D1 and O1 for property damage, personal injury and loss of services against D1 and the corporate owner of car 1. The various stages of the litigation may be depicted as follows:

I.	P1	v.	O2, D2	— J/P1
II.	D1	v.	O2, D2	— J/O2, D2
III.	O2, D2	v.	O1, D1	

As a complete defense in the third lawsuit, D1 offered the prior adjudication of the negligence of the driver of car 2, and moved for summary judgment. In denying the motion, Justice Main concluded that the prior decision in favor of the passenger of car 1 was not a bar to the present action, since an act of negligence may be a proximate cause of injuries to a passenger and "not necessarily" occupy the same causal relationship in producing injuries to the driver of the same vehicle.[240]

233. Brief for Appellant at 17a-143a; Brief for Respondent at 1a-15a.

234. Brief for Appellant at 145a.

235. Id. at 146a-147a. The negligence of the driver "cannot be imputed to or held against Henry Dresher riding as a passenger." Id. at 147a.

236. Id. at 157a.

237. Id. at 160a-161a.

238. Id.

239. 325 F.2d 156 (2d Cir. 1963).

240. 43 Misc. 2d at 558, 251 N.Y.S.2d at 599-600; see text accompanying note 172 supra.

Secondly, the prior judgment against D1 as plaintiff was not a bar to the present suit by O2 and D2 because the jury's observation that both drivers were negligent was "merely gratuitous."[241] Had the jury simply rendered a verdict of no cause of action without more, the verdict could have been predicated on the negligence of D1 or the freedom from negligence of D2. Since the court issued no instructions to make special findings, the sole office of the jury was to bring in a general verdict and any volunteered gloss could not attain the status of a necessarily determined issue. The court, therefore, confined the application of collateral estoppel to issues which were essential to reaching a decision in the prior litigation.[242]

The appellate division in affirming the denial of defendants' motion for summary judgment concluded that the prior judgment for P1 could not be raised as a defense by D1 and O1 because different factors might be involved.[243] The court also agreed with the decision below that the only finding necessary to render a verdict in the federal court case against the plaintiff, D1, was that he was contributorily negligent.[244]

Had the contest over the availability of collateral estoppel as a defense terminated at this point, *Cummings* would stand for an affirmation of established judicial interpretation of the doctrine. Since the parties-litigant were not identical in the state and federal cases, a symmetrical mutuality of estoppel was not present.[245] Even omitting from consideration the fact that the corporate defendant in the second action was an entirely new party, it still remains that D1 sought to borrow the judgment for his passenger in the latter's individual action in federal court against O2 and D2. D1 was not a party in the suit brought by his passenger. There was no privity or derivative liability.

Nevertheless, the separate actions of D1 and P1 were tried together against the same defendants before the same judge and jury. How accurately did, or could the jury follow the instructions to consider the evidence for each plaintiff independently? While, formally, it was unnecessary to a general verdict of no cause of action in D1's case to make

241. 43 Misc. 2d at 559, 251 N.Y.S.2d at 600.

242. Cambria v. Jeffery, 307 Mass. 49, 29 N.E.2d 555 (1940). The contention of the defendants' attorney was that there was no evidence in the federal court case which would permit a jury to find D2 negligent to P1 and not to D1. The plaintiffs' attorney emphasized, on the other hand, that the verdict was general: "No Comment of the jury was asked for and anything blurted out by Juror number 12, acting as Foreman was his own personal opinion . . . ." Record at 41. See Purpora v. Coney Island Dairy Prods. Corp., 262 App. Div. 908, 28 N.Y.S.2d 1008 (2d Dep't 1941).

243. 24 App. Div. 2d 912, 913, 264 N.Y.S.2d 430, 431 (3d Dep't 1965), rev'd, 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

244. Id. at 913, 264 N.Y.S.2d at 431-32.

245. Id. See also text accompanying note 120 supra.

a pronouncement of the other driver's negligence, and while the passenger and driver in one car may be dissimilarly affected by the negligent act of the driver of the other car, are these principles workable when the evidence draws no clear distinctions between the defendant's negligence vis-à-vis the passenger and his negligence vis-à-vis the driver of the same car?

There is no problem in *Cummings* of an attempted affirmative use of collateral estoppel since D1 and O1 interposed it as a defense.[246] Neither is any question raised of adversarial posture in the prior litigation since the record revealed that the drivers were active opponents throughout the joint trial. They were adversaries in federal court on the issues of negligence and contributory negligence.

In reversing the order denying the defendants' motion for summary judgment, Chief Judge Desmond relied squarely on identity of issues.[247] The jury's finding in the federal case that D2 was guilty of negligence is not treated as gratuitious or fortuitous surplusage but rather in the nature of a special finding to be accorded the significance which a formal special finding would have merited, had the court addressed the specific question to the jury.[248] The "same people were parties and all the same issues tried and decided" in the prior adjudication.[249] The actual litigation and actual decision of the negligence of D2 was the focal point, and further refinements in terms of a "necessarily determined" issue were not admitted as a restriction, by the court, upon the availability of estoppel. The "actual litigation" satisfied the due process requirement of a full opportunity to contest liability. The "actual decision" was exhibited in the jury's supplementation of its general verdict.[250] The opinion concluded that in the interest of a "non-repetitious judicial system," the court should give binding effect to the actually decided issue.

Judge (now Chief Judge) Fuld, in a concurring opinion reached the same result but on a strictly procedural ground.[251] In his view, O2 and D2

246. In the view of the appellate division, if collateral estoppel is to be invoked by one not a party in the prior case on the theory that the issues are identical, the doctrine may be used only as a shield.

247. 18 N.Y.2d 105, 108, 218 N.E.2d 688, 689, 271 N.Y.S.2d 976, 977 (1966). The court cited Israel v. Wood Dolson, Co., 1 N.Y.2d 116, 119, 134 N.E.2d 97, 99, 151 N.Y.S.2d 1, 4 (1956) and Commissioners of State Ins. Fund v. Low, 3 N.Y.2d 590, 595, 148 N.E.2d 136, 138, 170 N.Y.S.2d 795, 798 (1957).

248. Is it not particularly appropriate in New York, where plaintiff has both burdens on the negligence issue, to respect the jury's conclusions?

249. 18 N.Y.2d 105, 107, 218 N.E.2d 688, 689, 271 N.Y.S.2d 976, 977. The corporate owner of car 1 was not a party in the federal court case but his liability, if any, was dependent upon the liability of his driver.

250. The inscrutability of the general verdict, the difficulty of determining the actual finding on which it is based, has aroused the criticism of eminent jurists advocating a greater use of the special verdict. See pp. 42-47 infra.

251. 18 N.Y.2d 105, 108-09, 218 N.E.2d 688, 690-91, 271 N.Y.S.2d 976, 978-79 (1964).

as defendants in the former federal proceeding should have interposed a compulsory counterclaim pursuant to Federal Rule 13a.[252] Having failed to do so, the same parties were precluded from bringing subsequent causes of action as plaintiffs on the subject matter of their counterclaim. This approach raises the interesting possibility of permitting a wider application of collateral estoppel in cases involving a prior adjudication in federal court. It also provokes the question of whether the procedural rules of New York practice should adopt the federal compulsory counterclaim rule. Perhaps at least in this area of vehicle accident litigation, the New York legislature should consider this and other measures to channel all claims arising from the same occurrence into one composite trial. The underlying theme of the liberalization of party practice and of pleadings is the avoidance of repetitious litigation. The requirement that those who are already parties-defendant interpose *their* claims arising from the same accident would do no violence to that theme.[253]

If a direct procedural approach such as a compulsory counterclaim is not available and collateral estoppel is invoked on an "identity of issues" basis, there is yet the intricate problem of the relationship of parties which must be faced. Who may borrow the benefit of another's favorable judgment? If the first adjudication in *Cummings* (actually two individual causes of action) by D1 and P1 is not treated as a composite (even though not consolidated) action, and volunteered comments of the jury are silenced by the general verdict, then D1 is indeed interposing for his defense in the second action a prior judgment to which he was not a party or privy. A general verdict for O2 and D2 in D1's suit against them need mean only that D1 was contributorily negligent and O2 and D2 would be at liberty as plaintiffs to prove their freedom from contributory negligence in a second action.

In *Daly v. Terpening*,[254] the court carefully differentiated the roles of passenger and driver.[255] But there was nothing in the record before the court of appeals in *Cummings* to justify a division of D2's acts into two

See also United States v. Eastport Steamship Corp., 255 F.2d 795 (2d Cir. 1958); Horne v. Woolever, 170 Ohio St. 178, 163 N.E.2d 378 (1959).

252. This point was not raised by the parties in any of the proceedings in the state or federal courts.

253. In view of the present delays in bringing a negligence case to trial, there will usually be sufficient time to include in the counterclaim personal injuries which do not appear immediately.

254. 261 App. Div. 423, 26 N.Y.S.2d 160 (4th Dep't), aff'd mem., 287 N.Y. 611, 39 N.E.2d 260 (1941).

255. See text accompanying note 173 supra. Given the facts of the instant case, a jury in the consolidated trial of P1's and D1's claims could quite reasonably conclude that D2, by the same act or acts was negligent toward both. Is the technicality that the trial was joint rather than consolidated a sufficient justification for discarding the reasonable "finding" that D2 was negligent?

categories: those affecting D1 and those affecting P1. Chief Judge Desmond's opinion does not state, in so many words, that the driver may avail himself of the passenger's judgment, but such a conclusion may be implicit in the following passage:

> At the close of these Federal court proceedings it was completely clear that the jury had found that driver Mary Cummings had been found guilty of negligence and that, therefore, she as driver and her husband as owner had to pay damages to passenger Henry Dresher. Equally clear was the Federal court jury's finding that driver Bernard Dresher had been guilty of contributory negligence and so, notwithstanding the found negligence of driver Mary Cummings, Bernard Dresher could not recover against the defendants Cummings.[256]

Or does the opinion rest solely upon the jury's statement of the respective negligence of both drivers in D1's action?[257] In the future interpretations of this decision, judges may write one of the most provocative chapters in the tortuous history of collateral estoppel.

III. Recommendations

Since the preclusionary effect of a judgment need not, according to *DeWitt*,[258] be limited by considerations of mutuality, and assuming that *Cummings*[259] does not eliminate the requirement of privity, the two chief questions affecting an expanded availability of collateral estoppel are: how may more individuals whose claims or liabilities arise out of the same event be introduced to the first trial? How may more issues be conclusively determined between those who are parties?

The present doctrine of collateral estoppel in New York appears to permit a prior adjudication to be used offensively or defensively, by parties, privies and derivatively liable persons, against a former party or privy. *DeWitt* may logically be extended to include affirmative use by the primary actor (indemnitor) where the derivatively liable party (indemnitee) has obtained a judgment. There are precedents for this extension, at least as a defensive plea,[260] which with the abandonment of the shield-sword distinction, can justify such a development. Also, the insurer should be able to assert against a former party, offensively or defensively, a judgment for his insured or the insured's permittee where the basis of the insurer's non-liability has been determined.[261]

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256. 18 N.Y.2d 105, 107, 218 N.E.2d 688, 689, 271 N.Y.S.2d 976, 977 (1964).

257. The dissent analyzes both avenues by which D1 may assert collateral estoppel: via the judgment for P1 and the jury's comment on D2's negligence in D1's action. Id. at 110-13, 218 N.E.2d at 691-93, 271 N.Y.S.2d at 980-82.

258. B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

259. Cummings v. Dresher, 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

260. See note 126 supra.

261. See pp. 44-46 infra.

If the plaintiff chooses to sue only the driver, a procedure should be established whereby the owner can be made a party, thus implementing the legislative policy expressed in the Vehicle and Traffic Law.[262] Present practice permits a defendant to "proceed against a person not a party who is or may be liable *to him* for all or part of the plaintiff's claim against him."[263] Thus, impleader is not available to the driver in this case, for the owner's liability, if any, is to the plaintiff.[264]

How can the owner be converted into a party? It is suggested that a practice analogous procedurally, but not substantively,[265] to "vouching to warranty" be adopted.[266] The procedural similarity lies only in notice of the litigation[267] which the driver (or possibly the clerk of the court) would be required to communicate to the owner. The content of the notice and manner of communication should be reduced to a prescribed form to insure that the owner will be promptly and adequately alerted. The owner will be advised of his right to come in and participate fully in the defense. Finally, the notice should inform the owner that he will be bound by the judgment whether or not he avails himself of the invitation. Upon appearing, the owner would be free to present, and the court to weigh, any argument that his interest wil be prejudiced. The court in its discretion may choose to stay or to transfer the proceedings after consideration of the rights of all the parties involved.

It should be noted that compulsory joinder is in no sense part of the proposal here advanced. There is no merit in bringing back all of the former problems attendant upon that rule, now that the practice statute has substituted a flexible and equitable procedure.[268] In view of the long history in this state of the policy of owner responsibility, a fair method for vouching in the owner, according him a choice to defend or not and forewarning him of the conclusiveness of the judgment, is worthy of consideration.

Where the absentee owner alone is sued, he has a right of indemnity against the driver and could implead the latter.[269] However, since the judgment for the plaintiff will be satisfied out of the owner's liability in-

262. See pp. 4-11 supra.

263. N.Y. C.P.L.R. § 1007 (emphasis added).

264. N.Y. Veh. & Traf. Law § 388.

265. There is no accurate analogy between the owner of a vehicle and the manufacturer of chattels or the vendor of real property.

266. See 2 W.S. Holdsworth, A History of English Law 76, 112-14 (3d ed. 1923); Degnan & Barton, Vouching to Quality Warranty: Case Law and Commercial Code, 51 Calif. L. Rev. 471 (1963).

267. See N.Y. U.C.C. § 2-607(5)(a).

268. N.Y. C.P.L.R. § 1001.

269. But see note 125 supra.

surance, the plaintiff's interest would not be advanced by this procedure. A judgment for or against the owner should be binding upon the driver, and for that reason, it may be necessary to bring him in. As a practical matter, however, the plaintiff will seek his full recovery in the suit against the owner. If *DeWitt* is extended, the driver could use the owner's favorable judgment against the plaintiff since the plaintiff was a party to the prior adjudication.

Now assume that the plaintiff has joined both owner and driver as co-defendants. Although they are "joinable" tortfeasors, the liability, if any, of the driver rests on his own commissions or omissions; the owner's, is imposed by statute, even though he may be innocent of any fault. The owner can, therefore, cross claim against the driver and avoid a separate law suit to enforce his right of indemnification. Cross-claiming would yield more practical results, however, where the defendants represent different vehicles.[270] In such a case, the co-defendants should be encouraged, if not compelled, to interpose any claims between them arising from the same occurrence. New York's liberal cross claim provision embraces any claim between co-defendants.[271] Why should it not require those already made parties at the plaintiff's election to settle the issue of liability *inter se*?

Whether or not compulsion is introduced into present cross claim procedure, the courts can supply a strong incentive by allowing the first judgment against both defendants to be asserted in a subsequent suit between them. The argument that defendants are not adversaries has a hollow sound. Protecting his inchoate right to contribution should be sufficient stimulus for any defendant to cast fault upon his co-party. The formalistic adversarial requirement of *Glaser*[272] ought to be discarded so that a judgment may be conclusive between co-defendants.

Where the accident involves more than two vehicles, the possible combinations of fault increase as does the complexity of the evidence. A judgment against some or all of the owners or drivers may not fairly reflect the interrelationship of their liability. In such case, the judgment should not be used to cut off a claim where additional facts require consideration. A renunciation of the adversarial rule leaves the applicability of collateral estoppel open to the discretion of the court.

When the lawsuit is a contest between the owner or driver of one vehicle and the owner or driver of the other involved in the accident, a compulsory counterclaim rule would obviate re-trial of the same facts. While such a requirement would no longer permit the defendant the

270. E.g., P1 v. O1, O2 or O3 v. O1, O2.

271. N.Y. C.P.L.R. § 3019(b).

272. See text accompanying note 95 supra.

free choice which he now has, to pursue his cause of action as an independent suit rather than as a counterclaim,[273] the pressing need to economize litigation in the accident field outweighs individual preferences. The philosophy of the liberalized party practice provisions in the CPLR is to encourage the joining of as many claims as due process and trial convenience permit.

What expansion, consistent with due process, can be advocated in the class of persons who may assert collateral estoppel? What of those who occupy a "litigational or factual privity" relationship—such as the passengers of the same vehicle, or the passengers and owner or driver of the same vehicle? It is suggested that a passenger should be able to avail himself of the judgment for a fellow passenger or for the owner or driver of his vehicle, and that the owner or driver should be able to assert a judgment for his passenger, *provided*, the opposing owner or driver cannot demonstrate that his conduct toward one was distinguishable from his conduct toward the other. The burden of proof would be placed upon the party resisting collateral estoppel. Since it is believed that most accidents do not occur under circumstances permitting much in the way of last clear chance, the culpable party will have been negligent both to the other driver and to the latter's passenger. The door is not closed to proof of the contrary; but in the absence of such proof, passenger and driver (or owner) should be able to take advantage of each other's judgment. Similarly, where the defendant's liability has been conclusively established to one passenger, the court should not assume that the defendant's acts did not, in like manner, affect another passenger. Rather the defendant should be required to demonstrate the divisibility of his conduct. What has been said above does not reduce the necessity of the plaintiff's proving his freedom from contributory negligence.

Turning now to the second question—how may the initial litigation conclude more issues? Assuming a case such as *Hinchey v. Sellers*,[274] where the insurer is before the court in the first contest, the thorough trial of all the facts affecting the question of permission should have conclusive effect as to the same evidentiary facts in a later suit involving the owner or driver. While the ultimate issues are different—permission as a predicate for insurance coverage, versus permission as a basis for establishing statutory liability—what the owner and his bailee said or did can be adduced in testimony and reduced to findings by the court or by the jury in answer to interrogatories. Similarly, if the owner or driver is first sued, clearly established evidentiary facts underlying a determination of permission under Vehicle and Traffic Law section 388

273. N.Y. C.P.L.R. § 3019(a).

274. 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959).

should not be re-heard in an action against the insurer.[275] The court's findings or the jury's specific responses will thus constitute an essential step in reaching two decisions: the one based on construction of the insurance contract, the other on construction of the statute. There is no preclusion as between these distinct issues.

As to negligence, the court of appeals in *DeWitt* has clearly stated that a judgment for the plaintiff-indemnitor-driver is conclusive upon the issues of negligence and contributory negligence in a subsequent action against the same defendant by the indemnitee-owner. The same should obtain where the indemnitee is the initial plaintiff. When the situation is reversed and the indemnitor is sued and wins, the judgment necessarily determines only the contributory negligence of the losing plaintiff.[276] Thus, there are obstacles to the affirmative use of the judgment either by the indemnitor or indemnitee.

Absent a gratuitous observation of the jury or one which the court chooses to recognize, the general verdict does not speak to the question of the winning defendant's negligence. However, the matter may be clarified by instructions to the jury to make special findings on both points—negligence and contributory negligence. While this theoretically requires the jury to deliberate upon an additional and separate matter, the jury in most cases probably formulates a conclusion as to the negligence of each party. In New York, since the plaintiff bears the burden of proof on both scores, the matters are in issue, and the evidentiary basis should be laid at the trial for determination of the negligence of each party.

The judge might be aided in this respect by the formulation of pattern interrogatories, similar to the pattern jury instructions prepared by justices of New York's supreme court.[277] Much has been said about the deficiencies of the general verdict.[278] The availability and utilization of a simplified procedure for special findings can enlarge the preclusionary scope of the first judgment.

While the strictures that the binding proposition be ultimate[279] and

275. As a practical matter, counsel for the insurer will contest the issue of permission in all three cases. The court ought, however, to apprise the attorneys representing the individual parties, of the significance of the factual determinations relating to permission and enlist their cooperation in achieving a full hearing.

276. Cambria v. Jeffery, 307 Mass. 49, 29 N.E.2d 555 (1940); see Cummings v. Dresher, 18 N.Y.2d 105, 109, 218 N.E.2d 688, 691, 271 N.Y.S.2d 976, 979 (1966) (Bergan, J. dissenting).

277. Committee on Pattern Jury Instructions of the Association of Supreme Court Justices, New York Pattern Jury Instructions—Civil (1965).

278. See Skidmore v. Baltimore & O.R.R., 167 F.2d 54 (2d Cir. 1948); Sunderland, Verdicts, General and Special, 29 Yale L.J. 253 (1920).

279. See text accompanying notes 191-96, 219-24 supra.

necessarily determined[280] reflect a laudable and meticulous concern lest a party be bound on a matter he or the court treats collaterally, it does seem that an adequate measure of protection flows from the requirement that the conclusive proposition shall have been actually litigated.[281] Add to this the requirement that the matter determined be an essential step in reaching the final result, and a liberal and adaptable rule for issue binding emerges. It may appear too free-form but it is recommended for the typical accident case. Its operation must always be stayed where the resisting party can demonstrate the unfairness or inadequacy of the hearing.

It is acknowledged that if the innovations suggested above were implemented, the format of the accident case would be less like an individualistic duel and more like a tri-partite engagement in which the public interest in efficient judicial administration would be omnipresent. That, however, is not a frivolous consideration. If the plaintiff no longer enjoys free rein in managing his lawsuit, he may be rewarded by a speedier and more comprehensive adjudication.

Judges in the past have not reposed sufficient confidence in themselves to tolerate the operation of collateral estoppel without a network of stringent rules. The exceptions that have evolved, and the formalistic controls that have been abandoned, bear witness to the fact that there is no substitute for trained judicial judgment as the best means for safeguarding the right of due process.

280. See text accompanying notes 192-94 supra.

281. See text accompanying note 250 supra.

APPENDIX

In the diagrammatic representations employed, all parties owning, driving, occupying as passengers or insuring the first car will be represented by the postscript "1"; those associated with the second car will bear the postscript "2," etc. The alphabetical designations will be "O" for owner, "D" for driver, "P" for passenger and "Ir" for insurer. The symbol "J/" represents "judgment for." The Roman numerals "I" and "II" will indicate the first action and the second action respectively. Thus:

I. O1 v. O2 — J/O1

means that in the first action the owner of the first car sued the owner of the second car and judgment was rendered for the former.

HAVERHILL v. INTERNATIONAL RY., 217 App. Div. 521, 217 N.Y.S. 522 (4th Dep't 1926), *aff'd mem.*, 244 N.Y. 582, 155 N.E. 905 (1927), *overruled*, B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

I.	D1	v.	O2	—	J/D1
II.	O1	v.	O2	—	O1 may not use J/D1

NEENAN v. WOODSIDE ASTORIA TRANSPORTATION CO., 261 N.Y. 159, 184 N.E. 744 (1933).

I.	OD1	v.	O2	—	J/OD1
II.	P2	v.	OD1, O2	—	OD1 may not use J/OD1

GOOD HEALTH DAIRY PRODUCTS CORP. v. EMERY, 275 N.Y. 14, 9 N.E.2d 758 (1937).

I.	D1	v.	O2, D2	—	J/D1
II.	O2, D2	v.	O1, D1	—	D1 may use J/D1
				—	O1 may use J/D1

ELDER v. NEW YORK & PENNSYLVANIA MOTOR EXPRESS, INC., 284 N.Y. 350, 31 N.E.2d 188 (1940).

I.	O1	v.	O2	—	J/O1
	O2	v.	O1		
II.	D1	v.	O2	—	D1 may not use J/O1

DALY v. TERPENING, 261 App. Div. 423, 26 N.Y.S.2d 160 (4th Dep't 1941), *aff'd mem.*, 287 N.Y. 611, 39 N.E.2d 260 (1941).

I.	D1	v.	D2	—	J/D2
II.	P1 (by D1)	v.	D2	—	J/P1
III.	D2	v.	D1	—	D1 may not use J/P1

KINNEY v. STATE, 191 Misc. 128, 75 N.Y.S.2d 784 (Ct. Cl. 1947).

I.	P1	v.	State	—	J/P1
II.	P2	v.	State	—	P2 may use J/P1

UNITED MUTUAL FIRE INS. CO. v. SAELI, 272 App. Div. 951, 71 N.Y.S.2d 696 (4th Dep't), *aff'd mem.*, 297 N.Y. 611, 75 N.E.2d 626 (1947).

I.	D2	v.	O1, D1	—	J/O1, D1
II.	D1	v.	D2	—	J/D1
III.	Ir1, O1	v.	D2	—	Ir1, O1 may use J/O1, D1 and J/D1

ISRAEL v. WOOD DOLSON CO., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

I.	A	v.	X	—	J/X
II.	A	v.	Y	—	Y may use J/X

HINCHEY v. SELLERS, 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959).

I.	P1	v.	Ir1	—	J/Ir1
II.	P1	v.	O1	—	O1 may use evidentiary basis of J/Ir1

QUATROCHE v. CONSOLIDATED EDISON CO., 11 App. Div. 2d 665, 201 N.Y.S.2d 520 (1st Dep't 1960).

I.	O1, D1	v.	O2	—	J/O1, D1
II.	P1	v.	O2	—	P1 may not use J/O1, D1

MINKOFF v. BRENNER, 10 N.Y.2d 1030, 180 N.E.2d 434, 225 N.Y.S.2d 47 (1962).

I.	O3	v.	D1, O2, D2	—	J/O3
II.	D1	v.	O2, D2	—	O2, D2 may not use J/O3

CUMMINGS v. DRESHER, 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

I.	P1	v.	O2, D2	—	J/P1
II.	D1	v.	O2, D2	—	J/O2, D2
III.	O2, D2	v.	O1, D1	—	O1, D1 may use J/P1

B.R. DE WITT, INC. v. HALL, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

I.	D1	v.	O2	—	J/D1
II.	O1	v.	O2	—	O1 may use J/D1